Supreme Court, U.S.
FILED
No. 95-
95-848 NOV 30 1995
OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1995

MARTHA SABOL WRIGHT AND JOHN C. WRIGHT, JR.,
Petitioners,

v.

METROHEALTH MEDICAL CENTER,
PETROLEUM HELICOPTERS, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Should heightened scrutiny be applied to government employment rules which penalize an employee for marrying a fellow employee?

(2) Is the constitutional right to marry infringed when the government removes an employee from his or her position solely because he or she has married a fellow employee with whom he or she may "interact" on the job?

PARTIES

The petitioners are Martha Sabol Wright and John C. Wright, Jr..

The respondents are Metrohealth Medical Center, a county hospital in Cleveland, Ohio, Petroleum Helicopters, Inc., a private corporation, and four individuals employed by Metrohealth Medical Center or Petroleum Helicopters, Inc., Wayne Thompson, William Fallon, Betty Kovach and Charlene Mancuso.

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IN THE

Supreme Court of the United States

October Term, 1995
No.

MARTHA SABOL WRIGHT and JOHN C. WRIGHT, JR.,

Petitioners,

v.

METROHEALTH MEDICAL CENTER, PETROLEUM HELICOPTERS, INC., et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners Martha Sabol Wright and John C. Wright, Jr., respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on July 13, 1995, and the related appeal now pending in the Sixth Circuit sub nom. *Wright v. Petroleum Helicopters, Inc.* (No.

95-4260; 6th Cir.).[1] On September 1, 1995, the Court of Appeals denied a timely petition for rehearing of the July 13, 1995, decision.

This petition seeks a writ of certiorari to the Sixth Circuit to review two cases involving the identical question. Supreme Court Rule 12.2.

OPINIONS BELOW

The opinion of the Sixth Circuit, which is reported at 58 F. 3d 1130 (6th Cir. 1995), is set out at pp. 11a-32a of the Appendix hereto. ("App."). The order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc is unreported, and is set out at p. 33a of the Appendix. The decision of the District Court dismissing the 1993 complaint in this action is not reported, and is set out at pp. 1a-10a of the Appendix.

The November 17, 1995, order of the district court dismissing petitioners' 1995 complaint, which is not reported, is set out at p. 34a of the Appendix.

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[1]As is set forth in the statement of the case, this second appeal concerns matters which occurred while the first case was pending on appeal, and is controlled by the Sixth Circuit's decision of July 13, 1995. On November 28, 1995, petitioners filed a motion in the Sixth Circuit suggesting that the second appeal be summarily affirmed. If, as is likely, the second appeal is resolved by the Sixth Circuit prior to the time at which the instant petition is scheduled for conference by this Court, counsel for petitioners will immediately so advise the Clerk of this Court.

JURISDICTION

The decision of the Sixth Circuit was entered on July 13, 1995. A timely petition for rehearing was denied on September 1, 1995. This Court's jurisdiction exists under 28 U.S.C. section 1254(1).

A second, related case is now pending in the Sixth Circuit *sub. nom. Wright v. Petroleum Helicopters, Inc.*, No. 95-4260. A notice of appeal in this case was filed with the District Court on November 20, 1995, and the case was docketed in the Sixth Circuit on November 27, 1995. This Court's jurisdiction over this aspect of the case exists under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.". The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech".

STATEMENT OF THE CASE

(1) This action concerns the constitutionality of a government prohibition against employing a husband and wife in positions in which they could have occasion to "interact with each other." (App. 14a).

This litigation arose in connection with an emergency airlift medical service, LifeFlight. LifeFlight is owned and

operated by Metrohealth Medical Center, a county hospital located in Cleveland, Ohio; the helicopters utilized by LifeFlight are owned by and piloted by employees of Petroleum Helicopters, Inc., a private corporation under contract with Metrohealth. The airlift service is staffed by approximately 15 registered nurses, 18 pilots, and an indeterminate number of doctors. The doctors and nurses are employees of Metrohealth Medical Center.

Petitioner Martha Wright is a registered nurse who began work on the LifeFlight service in 1990; she is an employee of Metrohealth Medical Center. At the time this action commenced, petitioner John Wright was a pilot flying LifeFlight helicopters, and employed by Petroleum Helicopters Inc.. Although Petroleum Helicopters Inc. is a private corporation, its actions in connection with the instant litigation were taken at the behest and direction of Metrohealth; the courts below did not doubt that those actions were subject to the same constitutional constraints applicable to Metrohealth's own employees.

Petitioners became engaged in October 1991, and made their marriage plans known to Metrohealth officials. In December 1991, petitioners began living together, an arrangement to which respondents have repeatedly and expressly disclaimed any objection. However, in November, 1992, respondent Metrohealth warned petitioners that if they went ahead with their then impending wedding, they would be "in violation of" Metrohealth's "nepotism policy". That policy precludes the employment of a husband and wife in jobs in which "they would necessarily interact with each other." (App. 14a).

This admonition precipitated a dispute between petitioners and respondents regarding whether the

"nepotism" policy actually applied to petitioners. Petitioners noted that petitioner John Wright was not "employed by the Hospital", and thus fell outside the literal terms of Metrohealth's policy. Petitioners also objected that the positions that they held could not fairly be treated as so related as to fall under the policy, since in other instances married medical staff had been permitted to work together. The medical director of LifeFlight expressed the view that both petitioners should be permitted to work for LifeFlight even if married[2]. But higher level Metrohealth officials insisted that one of the petitioners be removed from LifeFlight.

Petitioners were married on December 19, 1992. On the day after their wedding, Metrohealth officials directed Petroleum Helicopters Inc. to remove petitioner John Wright from LifeFlight. On December 21, 1992, two days after the wedding, Petroleum Helicopters Inc., informed petitioner John Wright that he was being transferred to the company's operations in Louisiana.(App. 14a).[3]

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[2]Deposition of Walter L. Blount, Jr., p. 53 (the chief physician for LifeFlight "offer[ed] his support to[sic] allowing Ms. Sobol to continue in LifeFlight as a nurse"); Deposition of Mary Lou Monahan, p. 118 (the chief physician for LifeFlight had stated that he did "not have a problem with John and Martha being married and continuing in their current positions.")

[3]To avoid being separated from his wife, petitioner John Wright utilized his accumulated vacation days and remained in Ohio until, following the commencement of the instant litigation, counsel for the parties, at the behest of the district judge, agreed to postpone implementation of his transfer so long as the case was pending in the district court.

(2) Petitioners commenced this action on January 13, 1993, in Ohio state court. Petitioners alleged Metrohealth's policy violated, inter alia, the Equal Protection and Due Process Clauses of the Fourteenth Amendment because it violated their constitutional right to marriage. Petitioners also raised a number of state law claims. On January 15, 1993, respondents removed the proceeding to the United States District Court for the Northern District of Ohio. Federal jurisdiction was invoked under 28 U.S.C. sections 1343(3) and 1441.

On April 24, 1994, the district court granted summary judgment in favor of respondents on petitioners' constitutional claims; the court concluded that the disputed policy was in fact applicable to petitioners, and that the policy was constitutional. The district court also dismissed on the merits petitioners' state law claims.

On July 13, 1995, the Sixth Circuit affirmed. Although acknowledging that petitioners had a constitutional right to marry and that respondents' actions had imposed an "economic burden" on petitioners, the court of appeals held that respondents' actions were not subject to heightened scrutiny because those actions had not made petitioners' marriage "practically impossible."(App. 20a-21a). A timely petition for rehearing and suggestion for rehearing en banc were denied on September 1, 1995.(App. 33a).

(3) Following the commencement of this action, petitioners took two actions in an effort to accommodate respondents. First, petitioners agreed to work on different shifts, thus minimizing any chance that they would in fact "interact" on the job. Second, when LifeFlight began to operate out of a second facility in Solon, Ohio, petitioner John Wright transferred to Solon, while petitioner Martha

Wright continued to work at the LifeFlight operation sixteen miles away at the Metrohealth Medical Center in Cleveland. Respondents insisted, however, that both of these arrangements were unacceptable, and continued to demand that one of the petitioners be removed from LifeFlight altogether.

(4) On April 6, 1995, while the initial appeal was pending in the Sixth Circuit, respondent Petroleum Helicopters, Inc. dismissed petitioner John Wright. Subsequent to the Sixth Circuit's decision, petitioner John Wright commenced a second action in the district court, alleging that in dismissing him Petroleum Helicopters Inc. had acted at the behest of Metrohealth, as it had in 1992, and that he had been fired as a method of implementing respondents' nepotism policy. *Wright v. Petroleum Helicopters, Inc. et al.*, 95 CV 2412 (N.D.Ohio). Federal jurisdiction was invoked under 28 U.S.C. section 1343(3). Respondents contend that the dismissal was taken for legitimate reasons unrelated to the disputed nepotism policy.[4]

Under the Sixth Circuit's July 13, 1995, decision, however, the 1995 complaint did not state a claim on which relief could be granted. Petitioner John Wright acknowledged as much, and on November 17, 1995, the District Court dismissed the 1995 complaint. Petitioner has

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[4]Because the 1995 complaint was dismissed in light of the Sixth Circuit's opinion, respondents did not have occasion to file an answer to that complaint. In a state court proceeding brought earlier by petitioner to challenge the dismissal, however, respondents had asserted that his dismissal was ordered for reasons unrelated to that policy or the instant litigation.

appealed that dismissal to the Sixth Circuit, and has submitted to the court of appeals a memorandum acknowledging that that court's prior opinion requires summary affirmance.

(5) In light of the developments which have occurred since the 1993 complaint was first filed, the issues in dispute between petitioners and respondents are whether petitioners are entitled to (a) monetary relief for the period during which petitioner John Wright was reassigned to Louisiana[5], (b) monetary relief for the period following petitioner John Wright's dismissal, (c) prospective injunctive relief directing that petitioner John Wright be rehired, and (d) prospective injunctive relief against enforcement of the disputed "no interaction" policy.[6]

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[5]The monetary relief in question is the value of the vacation days petitioner John Wright consumed to avoid moving to Louisiana. Petitioners settled this claim against Petroleum Helicopters Inc., but it remains unresolved as against Metrohealth.

[6]While the 1993 complaint was still pending in the District court, respondent Metrohealth announced its "intention" was to enforce the policy, not by demanding transfer of petitioner John Wright, but by removing petitioner Martha Wright from LifeFlight and transferring her to another position at the hospital. Metrohealth insisted, however, that the manner in which it chose to implement its policy was still a matter within its "discretion", Brief of Defendant-Appellee Metrohealth Medical Center, p. 9, and that in exercising that discretion "the interests of Metrohealth . . . come first." Letter of Thomas H. Barnard to Barbara Kaye Besser, May 12, 1993, p. 2. Subsequently, however, petitioner John Wright was dismissed, allegedly as a method of enforcing that policy. Thus at this point in the litigation Metrohealth's one time stated "intention" appears to be devoid of practical significance.

(6) The instant petition asks this court to grant a writ of certiorari to the Sixth Circuit (a) to review that court's July 13, 1995, opinion, and (b) to review before judgment the pending appeal in *Wright v. Petroleum Helicopters, Inc.*. Supreme Court Rule 11. We have suggested to the Sixth Circuit that it dispose of the second appeal in an expeditious manner, so that its decision can be entered prior to the time when the instant petition is set for conference by this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH NUMEROUS DECISIONS OF THIS COURT

This case concerns one of the central tenets of this Court's constitutional jurisprudence--that the government may not, absent special justification, condition employment on the relinquishment of constitutional rights, or penalize employees for the exercise of those rights. On repeated occasions this Court has agreed unanimously that heightened scrutiny applies to employment rules that burden in this way the constitutional rights of government employees. *Rust v. Sullivan*, 500 U.S. 173, 197-99(majority opinion), 207, 212-13 (Blackmun, J., dissenting)(1991); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 71-79 (majority opinion), 98-100(Scalia, J., dissenting)(1990). The decision of the Sixth Circuit in the instant case, however, flatly refused to apply that well established rule. Instead, the court of appeals held that where government employees are removed from their

jobs because they exercised their constitutional rights to marry, no heightened scrutiny whatever is required.[7]

The constitutional principle disregarded by the court of appeals is a well established one.

> For at least a quarter-century, this court has made clear that even though a person has no "right" to a valuable government benefit, . . . the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . .[M]ost often we have applied the principle to denial of public employment.

Perry v. Sindermann, 408 U.S. 593, 597 (1972). "[L]oss of a job opportunity for failure to compromise one's convictions states a constitutional claim." *Rutan v. Republican Party of Illinois*, 497 U.S. at 77. "[O]ur 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the recipient . . . prohibiting the recipient from engaging in the protected conduct." *Rust v. Sullivan*, 500 U.S. at 197 (Emphasis omitted). This rule applies to any "adverse employment action" taken against an individual because of the exercise of a constitutionally protected right, *Rutan*, 497 U.S. at 62 (Scalia, J., dissenting), including actions with regard to hiring, dismissals, promotions, recalls, and transfers. *Id.* at 72-78(Majority opinion).

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[7]Petitioner John Wright is technically an employee of Petroleum Helicopters, Inc., a private corporation; because, however, Petroleum Helicopters Inc. acted at the behest of Metrohealth Medical Center, a county hospital, to implement a county rule, there is no question that those actions are subject to constitutional constraints.

The instant case presents a classic example of an unconstitutional condition. When petitioners advised county officials that they intended to exercise their constitutional right to marry, they were admonished that doing so would result in removal of one of the petitioners from his or her job. When petitioners nonetheless insisted on exercising that constitutional right, petitioner John Wright was for that reason summarily transferred from his home in Ohio to Louisiana, and later dismissed. The Sixth Circuit held, however, that respondents' actions were not subject to heightened scrutiny because, the court asserted, those actions did not "substantially interfere with the fundemental right to marry." (App. 21a). The Court of Appeals held that no constitutional claim was presented because the petitioners, even if physically separated by that compulsory transfer or otherwise penalized, had nonetheless succeeded in getting married. (App. 21a). The Sixth Circuit's analysis of this issue is at every turn flatly inconsistent with four decades of decisions by this Court.

The core of the Sixth Circuit decision is a holding that constitutional guarantees of fundamental rights apply only to government action which "create[s] a direct legal obstacle" to the exercise of those rights, thus making that exercise "practically impossible." (App. 20a-21a). An employment rule which requires an employee to choose between her constitutional rights and her job, the court of appeals held, raises no constitutional claim because the employee remains free to retain that constitutional right merely by accepting the "economic burden" of losing some or all of the benefits of her employment. This is precisely the holding of the long repudiated decision in *Adler v. Board of Education*, 342 U.S. 485, 493 (1952) ("[the employee's] freedom of choice *between* membership in [a disapproved]

organization and employment in the school system might be limited, but not his freedom of speech." (Emphasis added).)

> But constitutional doctrine which has emerged since that decision [in *Adler*] has rejected its major premise. That premise was that public employment may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action.

Keyishian v. Board of Regents, 385 U.S. 589, 605 (1967).

The Sixth Circuit insisted that government policies which penalize the exercise by government workers of their constitutional right to marry raise no constitutional issue because, despite any "economic burdens", "the policy does not forbid them from marrying."(App. 20a). But this Court has repeatedly held a variety of restrictions on government employees to be unconstitutional despite the fact that, like the rules in the instant case, those restrictions left workers free to exercise their constitutional rights if they were willing to relinquish their jobs. Thus in *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 283-84(1977), *Perry v. Sindermann*, 408 U.S. 593 (1972), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), there was no "direct legal obstacle" to criticism of school officials, only the "economic burden" of dismissal for those employees who had the temerity to exercise that constitutional right. It was not a "practical impossibility" for the plaintiffs in *Elrod v. Burns*, 427 U.S. 347 (1976) or *Branti v. Finkel*, 445 U.S. 507 (1980), to join the Republican Party, or for the plaintiffs in *Rutan* to belong to the Democratic Party. In *Torcaso v. Watkins*, 367 U.S. 488 (1961), Maryland law did not "forbid" the plaintiff to be

an agnostic. Yet in every one of these cases this Court applied some form of heightened scrutiny and found a constitutional violation.

The Sixth Circuit recognized that employees who exercised their constitutional right to marry would suffer an "economic burden", but dismissed that penalty as an "incidental effect" of government policy. (App. 20a). But the existence of such an "economic burden"--the loss of the government benefit conditioned on relinquishment of a constitutional right--is the linchpin of this Court's unconstitutional condition doctrine.

> A state job is valuable. Like most employment, it provides regular paychecks, health insurance, and other benefits. . . . Thus, denial of a state job is a serious privation. Nonetheless, respondents contend that the *burden* imposed is not of constitutional magnitude. Decades of decisions by this Court belie such a claim.

Rutan, 497 U.S. at 77(Emphasis added, footnote omitted). The unconstitutional condition doctrine does not turn on the magnitude of the economic burden imposed on those who exercise their constitutional rights. Thus in *Rutan* the Court held that heightened scrutiny applied to transfers tied to political affiliation, since the exercise of their constitutional rights imposed on the employees involved "the hours and

maintenance expenses that are consumed by long daily commutes". 497 U.S. at 74.[8]

The rule adopted by the Sixth Circuit is that the Constitution limits only "direct" restraints on the exercise of fundamental rights; denial of a government benefit to those who exercise their rights is not subject to heightened scrutiny because, it reasoned, that denial interferes with the rights at issue only "indirect[ly]." On this view, although it was unconstitutional in *Zablocki v. Redhail*, 434 U.S. 374 (1978), for the Milwaukee County Clerk to deny marriage licenses to fathers of children on AFDC, the Clerk could have sought the same goals by dismissing any employee of the Clerk's office who sought to marry after having fathered a child on welfare. But this Court has repeatedly held that the government cannot, by attaching conditions to government employment, achieve indirectly the very results which could not under the constitution be brought about directly.

> [F]or if the government could deny a benefit to a person because of his constitutionally protected [conduct], his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."

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[8]In *Torcaso v. Watkins*, 367 U.S. 488 (1961), the burden at issue was deprivation of a commission as a notary public, a position whose economic value is ordinarily quite nominal. In *Speiser v. Randall*, 357 U.S. 513 (1958), this Court declared unconstitutional a condition that had denied the plaintiff there an exemption from property tax for the first $1000 of the value of his property. Cal. Const. Art. XIII section 1 ¼.

Perry v. Sindermann, 408 U.S. at 597. "What the First Amendment precludes the government from commanding, it also precludes the government from accomplishing indirectly". *Rutan v. Republican Party of Illinois*, 497 U.S. at 77-78.

The Sixth Circuit held that constitutional guarantees are simply not relevant where the government takes action against an employee to achieve some benign purpose, rather than with an intent to control the exercise of constitutional rights. "Any . . . burden created is no more than an incidental effect of a policy aimed at maintaining the operational efficiency of governmental departments, not a direct attempt to control the marital decisions of . . employees." (App. 20a). But similarly benign purposes animated many of the practices held by this Court to impose unconstitutional conditions. E.g. *Rutan v. Republican Party of Illinois*, 497 U.S. at 74 (restrictions unconstitutional even if adopted for the purpose of ensuring that government employees would faithfully implement policies of elected officials). In *Branti v. Finkel* this Court expressly considered and rejected the contention that the unconstitutional condition doctrine should be limited to cases in which the government actually sought to coerce employees into not exercising the constitutional right in question. 445 U.S. at 516.

Heightened constitutional scrutiny clearly would have been required by the decisions of this Court if respondents had transferred petitioner John Wright to Louisiana, or dismissed him, because he had exercised his constitutional right to join a political party, *Elrod v. Burns*, to criticize county health officials, *Perry v, Sindermann*, or to adhere to a particular religious faith. *Torcaso v. Watkins*. The

constitutional significance in the instant case of that very same burden is surely no different merely because the constitutional right at issue here is the right to marry. The decisions of this Court preclude any suggestion that the right to marriage is of any lesser importance than other fundamental rights. In *United States v. Kras*, 409 U.S. 434 (1973), the Court stressed that "free speech [and] marriage [are] . . . rights that the Court has come to regard as fundamental." 409 U.S. at 446. In *Zablocki v. Redhail*, the Court insisted that the right to marry "must receive equivalent protection" to that accorded to the right to obtain an abortion. 434 U.S. at 386. See also *Loving v. Virginia*, 388 U.S 1, 12 (1967)("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival"); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)("Marriage . . . [is] fundamental to the very existence and survival of the human race"); *Maynard v. Hill*, 125 U.S. 190, 205 (1888)("Marriage . . . creat[es] the most important relation in life, . . . having more to do with the morals and civilization of a people than any institution.")

The Sixth Circuit suggested that its refusal to follow the unconstitutional condition doctrine was mandated by this Court's decision in *Zablocki v. Redhail*, 434 U.S. 374 (1978)(App. 19a-20a). But in the fifteen years since *Zablocki*, this Court has continued to apply that doctrine in a wide variety of circumstances.[9] The court of appeal's mistaken insistence that the right to marriage protects only

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[9]*Waters v. Churchill*, 114 S. Ct. 1878 (1994); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Branti v. Finkel*, 445 U.S. 506 (1980); *Givhan v. Western Lines Consolidated School District*, 439 U.S. 410 (1979).

individuals literally unable to marry derives at least in part from a misleading editing by the court of appeals of the text of the opinion in *Zablocki*. *Zablocki* itself describes three different categories of individuals whose rights were violated in that case; a list which expressly included individuals who were *not* prevented or deterred from marrying:

> [1] Some . . . are absolutely prevented from getting married. [2] Many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry. [3] And even those who can be persuaded to meet the statute's requirements suffer serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental.

434 U.S. at 387. The Sixth Circuit's quotation of *Zablocki* inexplicably omits the pivotal last sentence. (App. 19a).

Certiorari should be granted to correct this palpable and important departure from the precedents of this Court.

II. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF TWO OTHER CIRCUITS AND OF THE SUPREME COURTS OF FIVE STATES

The lower courts are sharply divided as to whether heightened scrutiny should be applied where government employees are dismissed, or subject to other adverse action, because of their exercise of the constitutional right to marry. The Ninth and Eleventh Circuits, like the Sixth Circuit,

reject heightened scrutiny. On the other hand, the Eighth and Tenth Circuits, together with the courts of last resort of five states, apply some form of heightened scrutiny. The decisions applying heightened scrutiny, not surprisingly, frequently rely on this Court's unconstitutional condition decisions.[10] As Judge Posner has observed, "the caselaw in this area, maybe because the subject matter is so emotional . . . is untidy." *Hameetman v. City of Chicago*, 776 F. 2d 636, 643 (7th Cir. 1985); see also *id.*; at 642 ("the scope of the doctrine [in cases such as *Zablocki*] is unsettled"); *Townshend v. Board of Education of Grant County*, 396 S.E. 2d 185, 190 n.4 (W.Va. 1990)(criticizing as "eccentric" decisions in other states).

The minority view refusing to apply heightened scrutiny has been adopted by the Ninth and Eleventh Circuits. In *Parks v. City of Warner Robins, Georgia*, 43 F. 3d 609 (11th Cir. 1995), the plaintiffs, both employees of a city police department, were instructed that if they married the female officer would be dismissed.

> Rather than losing her job, Parks postponed the wedding and brought the instant lawsuit; [the two officers] have remained engaged, but unmarried, for over four years.

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[10]E.g., *Voichahoske v. City of Grand Island*, 231 N.W. 2d 124, 127, 194 Neb. 175 (1975)(*citing Keyishian*, *Perry*, and *Pickering*); *Cybyske v. Independent School Dist. No. 196*, 347 N.W. 2d 256, 262 (Minn. 1984)(*citing Pickering*); *Hall v. Board of Education*, 639 F. Supp. 501, 512 (N.D.Ill. 1986)(*citing Pickering*); *Newborn v. Morrison*, 440 F. Supp. 623, 627 (S.D.Ill. 1977)(*citing Pickering*); *O'Neill v. Dent*, 364 F. Supp. 565, 570 (E.D.N.Y. 1973)(*citing Keyishian* and *Pickering*.)

43 F. 3d at 612. The Eleventh Circuit held that the policy in question did not "'significantly interfere[e]' with the decision to marry." 43 F. 3d at 613. The Ninth Circuit adopted the same rule in *Parsons v. County of Del Norte*, 728 F. 2d 1234 (9th Cir 1984). *Parsons* and *Parks*, like the Sixth Circuit in the instant case, specifically refused to apply strict scrutiny to adverse employment action taken against government employees who exercise their right to marry, utilizing instead a minimal rational basis standard. (App. 21a-22a; *Parks v. City of Warner Robins*, 43 F. 3d at 613-15; *Parsons v. County of Del Norte*, 728 F. 2d at 1237).

The Nebraska Supreme Court, on the other hand, expressly applies strict scrutiny in such circumstances:

> [A] public employee . . . may not be dismissed or failed to be rehired for impermissible constitutional reasons such as race, religion *or the assertion of rights guaranteed by law or under the constitution.*" . . . *Perry v. Sindermann* . . . *Keyishian v. Board of Regents* . . . [W]here a classification impinges upon fundamental freedoms protected by the Constitution, such classification must . . . be not merely rationally related to a valid purpose, but necessary to the achievement of a compelling state interest. . . . The . . . right to marry . . . is a fundamental right afforded protection by the . . . United States Constitution . . . Therefore, . . . the [anti-nepotism] rule in question can only be sustained if it promotes a compelling governmental interest.

Voichahoske v. City of Grand Island, 231 N.W. 2d 124, 127-28, 194 Neb. 175 (1975)(Emphasis in original). Similarly, the Colorado Supreme Court requires proof of a "compelling state interest" to justify the exclusion of married students from significant aspects of public school activities. *Zavala v. City and County of Denver*, 759 P. 2d 664, 673 (Colo. 1988)(approving *Beeson v. Kiowa County*, 576 P. 2d 801, 39 Colo. App 174 (1977)).[11]

The Iowa Supreme Court applies "'middle-level scrutiny' . . . , asking whether [an] anti-nepotism provision ha[s] a fair and substantial relationship to a laudable legislative purpose," upholding such provisions if they are "narrowly drawn" and "forwar[d] an important governmental objective." *Sioux City Police Officers Ass'n v. City of Sioux City*, 495 N.W. 2d 687, 697 (Iowa 1993). Similarly, the Eighth Circuit applies to anti-nepotism rules the intermediate scrutiny standard of *Reed v. Reed*, 404 U.S. 71 (1971). *Espinoza v. Thoma*, 580 F. 2d 346, 348 (8th Cir. 1978)(the "no-spouse employment rule . . .[under]*Reed v. Reed* . . . must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."). Intermediate scrutiny is also utilized by the Michigan courts. *Winrick v. City of Warren*, 299 N.W. 2d 27, 28, 99 Mich. App. 770 (1980)("A constitutional analysis of the Warren antinepotism charter provision requires a middle level scrutiny . . . not [proof of] a compelling state interest . . . [n]or . . . the . . . least stringent 'rational basis' test");

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[11]See 567 P. 2d at 805("the creation of a 'marriage relationship' is a fundamental right. . . . Hence . . . a board policy which discriminates against those who exercise that right violates the . . . Fourteenth Amendment . . . unless there exists a compelling state interest which justifies that discrimination.")

see *Bretz v. City of Center Line*, 276 N.W. 2d 617, 618 (Mich. Ct. App. 1979)(applying *Reed v. Reed* "test . . . to determine the constitutionality of the . . . ordinance" precluding hiring of sister of existing employee.)

The Supreme Court of Minnesota applies to these types of claims a balancing test. In *Cybyske v. Independent School Dist. No. 196*, 347 N.W. 2d 256 (Minn. 1984), the Minnesota court held that a refusal to hire a job applicant "because of her particular choice of marriage partner" would "impair" the applicant's right to marriage and association; the constitutionality vel non of such a refusal, it ruled, would turn on "*balancing* the 'right to marriage' claim against the . . . public purpose for the employer's actions." 347 N.W. 2d at 263 (emphasis added).[12] A similar approach is utilized in South Carolina. *Hamilton v. Board of Trustees of Oconee County*, 319 S.E.2d 717, 721 (S.C.App. 1984)(controlling issue is whether the school board's interest in avoiding conflicts of interest "outweighs" impact on plaintiff's constitutional right to marry).

The Tenth Circuit, contrary to the Sixth, Ninth and Eleventh Circuits, holds that "[a]ctions taken by a public official against a public employee because of the employee's spouse can in certain circumstances . . . unconstitutionally burden the marriage relationship." *Morfin v. Albuquerque*

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[12]See also *id.*("a teacher's associational freedom can be compromised in the school setting if *outweighed* by an appropriate concern of the public employer.")(Emphasis added).

Public Schools, 906 F. 2d 1434, 1440 (10th Cir. 1990).[13] In that circuit the controlling constitutional standard is whether the "interference" with "the marital relationship is . . . *unreasonable*." 906 F. 2d at 1439 (Emphasis added). The West Virginia Supreme Court utilizes a similar standard. *Townshend v. Board of Education*, 396 F. 2d 185, 189 (is burden "reasonable"?), 190 (were "the policies . . . unreasonably overbroad"?)(W. Va. 1990).

In sum, the lower courts are now applying five distinct standards in evaluating claims that government employment rules penalize workers for exercising their constitutional right to marry. (1) The Sixth, Ninth and Eleventh Circuits use a minimal rational basis test. (2) The Nebraska and Colorado courts apply strict scrutiny. (3) The Eighth Circuit and state courts in Iowa and Michigan utilize intermediate scrutiny. (4) Minnesota and South Carolina state courts apply a balancing test. (5) In West Virginia and the Tenth Circuit a "reasonableness" standard is applied.

Certiorari should be granted to resolve the pervasive differences among the lower courts about this important and recurring issue.

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[13]The Tenth Circuit decision cited with approval two district court opinions that had applied a strict scrutiny test. *Hughes v. Lipscher*, 720 F. Supp. 454, 458-61 (D.N.J. 1989); *Newborn v. Morrison*, 440 F. Supp. 623, 626-27 (S.D.Ill. 1977).

III.
THIS CASE PRESENTS AN IMPORTANT CONSTITUTIONAL ISSUE WHICH SHOULD BE RESOLVED BY THIS COURT

This case arises at a time when countless women and men in all walks of life are struggling to balance the often conflicting demands of work and family. The hours, energy and pressures of work sorely tax the resources of husbands and wives committed to their marriages and to raising a family. Policies such as respondents' can readily make a difficult situation impossible. At the very outset of petitioners' marriage, their wedding led respondents to transfer petitioner John Wright a thousand miles from his bride, and ultimately to dismiss him. The Sixth Circuit's characterization of that transfer as not involving a "substantial burden" on petitioners' marriage reflects an incomprehensible insensitivity to the realities and very purposes of married life.

The decisions of the Sixth, Ninth and Eleventh circuits permit a government employer to penalize the exercise of the right to marriage in a way that clearly would not be permitted for the exercise of any other constitutional right. The right to marriage is thus relegated in those circuits to a second class status, inferior in importance and scope to other fundamental rights. The consequences of this disparate treatment are strikingly incongruous.

Although the Sixth Circuit accords no constitutional protection against adverse employment actions penalizing *marriage*, that circuit expressly (and properly) applies heightened scrutiny to government employment actions which penalize *divorce*. In *Littlejohn v. Rose*, 768 F. 2d 765

(6th Cir. 1985), the court of appeals held that a school board could not constitutionally refuse to rehire a teacher because she was obtaining a divorce.[14]

Similarly, the Eleventh Circuit holds that the constitution accords no protection to a police officer forced to resign because married to another police officer. *Parks v. City of Warner Robins*, 43 F. 3d 609 (11th Cir. 1995). But that circuit holds that the same officer *would* be protected by the constitution if he or she faced discipline for dating the daughter of a convicted mobster. *Wilson v. Taylor*, 733 F. 2d 1539 (11th Cir. 1984).[15] Fifth Circuit precedent from

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[14]768 F. 2d at 768-770:

> "Given the 'associational interests that surround the . . . dissolution of [the marital] relationship', such 'adjustments' as divorce and separation are naturally included within the umbrella of protection accorded to the right of privacy. . . . The Supreme Court has generally rejected the theory that a government benefit, such as public employment . . . may be denied . . . on a basis that infringes . . . constitutionally protected interests . . . . [A] person's involvement in activity shielded by the constitutionally protected rights of privacy and liberty constitutes an impermissible reason for denying employment. . . . . Littlejohn's claim falls within the principles set forth above. She has presented evidence that she was denied employment because of her impending divorce."

[15]In *Wilson* the plaintiff had been dismissed for dating one Susan Blackburn, "the adopted daughter of . . . a convicted felon reputed to be a key figure in organized crime in central Florida." 733 F. 2d at 1540. The court of appeals held that the dismissal was a per se violation of the constitution. "[G]overnment employment may not be

before the creation of the Eleventh Circuit, and thus controlling in both circuits, precludes a government agency from refusing to hire a job applicant solely because she is an unwed mother. *Andrews v. Drew Municipal Separate School District*, 507 F. 2d 611 (5th Cir. 1975).

Where a government employee is forced to resign because of her marriage to a fellow employee, the Ninth Circuit subjects that government policy to only minimal rational basis scrutiny. *Parsons v. County of Del Norte*, 728 F. 2d 1234, 1237 (9th Cir. 1984). But if the County of Del Norte had dismissed one of its employees because he was an acknowledge homosexual, the Ninth Circuit would apply a more searching heightened scrutiny. *Meinhold v. U.S. Department of Defense*, 34 F. 3d 1469 (9th Cir. 1994).

The government employment policy in the instant case permitted petitioners to date, to cohabit, to favor sexual partners of any type or number, to have children out of wedlock, to select virtually any relationship except the traditional relationship of wife and husband. Among the wide array of possible personal lifestyles, the Sixth, Ninth and Eleventh Circuits single out marriage as uniquely undeserving of constitutional protection. It is inconceivable that the framers intended, or could even have imagined, such an incomprehensible constitutional rule. If petitioners

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conditioned upon a relinquishment of a constitutional right . . . . [D]ating is a type of association protected by the first amendment's freedom of association. . . . [T]he relationship between Wilson and Susan Blackburn was protected by the first amendment freedom of association. . . . Wilson was fired for a reason infringing upon his constitutionally-protected freedom of association)" 733 F. 2d at 1542-44.

had joined the Communist Party or a coven which practiced Satanism, their actions would have been presumptively protected by the Constitution; surely the result can be no difference because they chose, instead, to be joined in holy wedlock.

We do not suggest that the application of anti-nepotism policies to spouses is always per se unconstitutional. Where the relationship between two married employees is that of supervisor and subordinate, the government may well have a compelling interest in assigning one of the workers to another position. But many nepotism policies, like the policy here, are far more sweeping. There are numerous instances of policies which exclude one spouse from working anywhere in the same agency as another[16], or even from working for the same city.[17] In the instant case,

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[16]*Espinoza v. Thoma*, 580 F. 2d 346, 347 (8th Cir. 1978)(prohibition against employment of spouses by Omaha Metro Area Transit); *Parks v. City of Warner Robins*, 43 F. 3d 609, 612 n. 1 (11th Cir. 1995)(prohibition against marriage by any two supervisors in the same department); *Parsons v. County of del Norte*, 728 F. 2d 1234, 1236 n. 2(9th Cir. 1984)(prohibition against hiring any person married to an existing employee in same department); *Sioux City Police Officers' Association v. City of Sioux City*, 495 N.W. 2d 687, 690 (Iowa 1993)(prohibition against hiring any person married to an existing employee in same department).

[17]*Bretz v. City of Center Line*, 276 N.W. 2d 617, 617-18 (Mich. Ct. App. 1979)(prohibition against employment of spouse of any employee of "[a]ny agency, board, body, commission, committee, department or office of the city of Center Line"); *Voichahoske v. City of Grand Island*, 231 N.W. 2d 124, 125, 194 Neb. 175 (1975)(defining as "conduct prejudicial to the public interest", and thus grounds for dismissal, "[c]hanging status, by marriage . . . , which would result in more than one person in a household being on the payroll of the city

there was no supervisory relationship between the two petitioners; they did not even work for the same employer. Petitioner Martha Wright played no part in the flying of the LifeFlight helicopters, and petitioner John Wright played no role in providing medical services. Far from serving a compelling governmental interest, respondents' refusal to permit John Wright to fly a helicopter in which Martha Wright was treating an emergency patient was so overbroad as to fail to satisfy even the minimal rational basis test.

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of Grand Island.")

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit, and to review before judgment[18] the appeal now pending in the Sixth Circuit sub nom. *Wright v. Petroleum Helicopters Inc.*

Respectfully submitted,

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[18]This appeal was pending unresolved in the Sixth Circuit as of November 28, 1995. If the Sixth Circuit has summarily affirmed that appeal prior to the point in time when this Court considers the instant petition, the petition will no longer involve a request for certiorari before judgment.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MARTHA SABOL WRIGHT, *et al.*, Plaintiffs, vs. METROHEALTH MEDICAL CENTER; *et al.*, Defendants.	No. 1:93CV0116 Judge John M. Manos

On January 13, 1993, Martha Sabol Wright and John C. Wright, Jr., plaintiffs, filed the above captioned case in the Court of Common Pleas of Cuyahoga County, Ohio against MetroHealth Medical Center (MetroHealth) and Petroleum Helicopters, Inc. (PHI), defendants. Plaintiffs alleged that MetroHealth violated their rights pursuant to 42 U.S.C. § 1983 by denying them equal protection and due process of law. They also alleged a number of tort claims against both defendants. On January 15, 1993, defendants removed the case. Jurisdiction is appropriate pursuant to 28 U.S.C. § 1331.

On January 25, 1993, MetroHealth moved to dismiss pursuant to Fed. R. Civ. P.12(b)(6), and on February 8, 1993, PHI also so moved. On April 20, 1993, the parties

reached a stipulated settlement, however, on May 12, 1993, plaintiffs moved to vacate the settlement and reopen the proceedings.[1] On May 27, 1993, Metrohealth filed a supplemental brief in support of its motion to dismiss and a motion for summary judgment on the § 1983 claim. On January 11, 1994, plaintiffs moved for partial summary judgment against MetroHealth on the § 1983 claim. For the following reasons, MetroHealth's motion for summary judgment is granted and plaintiffs' motion is denied. Furthermore, MetroHealth's and PHI's motions to dismiss the state claims are granted.

I.

Defendant MetroHealth is an Ohio entity providing health care services in Cuyahoga County. Plaintiff Martha Sabol Wright has been employed by MetroHealth as a registered nurse since October, 1984. Plaintiff John C. Wright, Jr. has been employed by defendant PHI as a helicopter pilot since 1985.

MetroHealth and PHI are parties to a contract by which PHI supplies helicopter services to MetroHealth's Life Flight operations. The crew for each Life Flight operation consists of a MetroHealth doctor and registered nurse, and two PHI pilots.

In 1990, Martha Sabol Wright was transferred from MetroHealth's I.C.U. to the Life Flight operations, in which John Wright is a pilot. In October 1991, Martha and John became engaged and in December 1991, they began

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[1]The court held a number of settlement conferences, however, the parties could not reach an agreement and on January 12, 1994, the court officially vacated the settlement and reopened the case.

cohabiting. They informed their respective employers of their living situation and impending marriage.

On November 17, 1992, MetroHealth informed the plaintiffs that under its Nepotism Policy married couples are not allowed to work in the same unit, and that if they married, one of them would be transferred to another unit.[2] It also offered to transfer Martha Wright to another unit of the hospital with the same grade and pay, however, she refused.

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[2]MetroHealth's Job Selection and Placement Policy No. II-6 provides in part:

Section X. NEPOTISM

A. In order to prevent conflicts which may arise in situations where members of the same immediate family are employed by the Hospital, the Hospital will not allow an individual to be employed, transferred or promoted, where as a result, any of the following situations would exist: . . .

3. Members of the same immediate family being in positions which are of such close proximity that they would necessarily interact with each other in the performance of their duties . . .

C. If, as a result of a marriage between two employees, a violation of the Nepotism guidelines arises, the affected employees will be given the option of electing which spouse will be moved to another position in the Hospital System so as to eliminate the nepotism violation. If no election is made by either spouse within thirty (30) calendar days after notice to the employees, the least senior in terms of Hospital seniority will be moved. All reasonable attempts will be made to insure that the displaced employee is given a position of comparable responsibility and pay.

On December 19, 1992, plaintiffs were married. On December 20, 1992, MetroHealth requested that PHI transfer John Wright from the Life Flight crews and on December 21, 1992, PHI informed him that he was being transferred, effective January 19, 1993, to Louisiana. Plaintiffs filed this case seeking declaratory and injunctive relief, and unspecified money damages. They allege five causes of action stemming from MetroHealth's application of its Nepotism Policy: (1) tortious interference with John Wright's business relationship with PHI; (2) intentional inflection of emotional distress; (3) a violation of Ohio public policy; (4) sex discrimination in violation of O.R.C. § 4112.99; and (5) a violation of equal protection and due process of law.

After the case was filed, defendants agreed not to transfer John Wright, but instead, to transfer Martha Wright to another unit of the hospital.[3]

II.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The party moving for summary judgment bears the initial burden of production under Rule 56. The burden may be satisfied by presenting affirmative evidence that negates an element of the non-movant's claim or by

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[3]During the pendency of this case, MetroHealth has agreed not to transfer Martha and has scheduled her assignments so that she and John have not flown in the same helicopter.

demonstrating "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986).

If the movant meets this burden, the non-movant must "set forth the specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The substantive law identifies which specific facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 256, 106 S.Ct. at 2513 (citing *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). However, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986). "[T]he mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion" for summary judgment. *Anderson*, 477 U.S. at 247-48, 106 S.Ct. at 2510.

III.

A.

Plaintiffs first argue that MetroHealth's nepotism policy does not apply to their situation because John Wright is not a MetroHealth employee. However, the contract between MetroHealth and PHI states that PHI employees are subject to MetroHealth rules. Furthermore, MetroHealth can transfer Martha Wright regardless of

whether she and John are both its employees. MetroHealth Policy No.II-6 states:

III. TRANSFERS

> A. Employees may be transferred within their job classification to another department, nursing unit or shift anywhere within a medical center unit for reasons of meeting patient care needs, efficiency, economy, or other good reason.

Therefore, MetroHealth can transfer Martha Wright based on the same policy concerns that caused it to promulgate its nepotism policy even if the policy does not specifically apply to John Wright.

B.

Plaintiffs argue that MetroHealth's nepotism policy "infringes upon the fundamental right to marry," and therefore is subject to strict scrutiny review under the equal protection clause. Although marriage is a "fundamental right" subject to strict scrutiny, nepotism policies primarily concern conditions of employment, not marriage. *See Parsons v. County of Del Norte*, 728 F.2d 1234, 1237 (1984), *cert. denied*, 105 S.Ct. 158 (1984). "Only when a government regulation directly and substantially interferes with the fundamental incidents of marriage is such strict scrutiny applicable." *Id. citing Zablocki v. Redhail*, 434 U.S. 374, 386, 98 S.Ct. 673 (1978). Therefore, the regulation is subject to a rational basis test and "it will be upheld unless there is no rational basis for its enactment." *Id.* (citations omitted).MetroHealth states that its nepotism policy is necessary to (1) "avoid potential conflicts that might arise when two closely related persons allow their personal life to impinge on their professional life" and (2) "prevent morale

among other workers from deteriorating due to the unique relationship between the married co-workers." These reasons provide a rational basis for MetroHealth's nepotism policy and the policy is not unconstitutional on its face. *See Parsons*, 728 F.2d 1234 (9th Cir. 1984); *Cutts v. Fowler*, 692 F.2d 138 (D.C. Cir. 1982); *Keckeisen v. Independent School District*, 509 F.2d 1062 (8th Cir. 1975).

C.

Plaintiffs further allege that MetroHealth selectively enforces its nepotism policy.[4] They charge that selective enforcement of the policy violates equal protection and that MetroHealth enforces the policy in an "arbitrary and capricious manner" in violation of the due process clause. Selective enforcement of a facially constitutional regulation does not, standing alone, violate equal protection. *Wayte v. United States*, 470 U.S. 598, 105 S.Ct. 1524, 1531 (1985); *Harrington v. United States*, 673 F.2d 7 (1st Cir. 1982). A plaintiff must also show that the regulation was selectively enforced because of invidious discrimination.

> A claim of selective application of a facially lawful state regulation requires a showing that . . . the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person.

FSX Drug Corp. v. Perales, 960 F.2d 6, 10 (2nd Cir. 1992). Plaintiffs do not allege invidious discrimination because of

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[4]Plaintiffs state that there are 18 married couples who work together at the hospital.

an impermissible consideration and there are no operative facts to suggest bad faith.

Plaintiffs also charge that selective application of the nepotism policy to them constitutes "arbitrary and capricious" state action. The due process clause protects fundamental rights from deprivation because of arbitrary and capricious state action. *Gutzwiller v. Fenik*, 860 F.2d 1317 (6th Cir. 1988).

MetroHealth responds that it has not infringed a fundamental right of the plaintiffs, because it only intends to transfer Martha Wright from the Life Flight unit to a comparable position in another unit of the hospital.[5] Because nepotism policies do not violate the fundamental right to marriage, the only "fundamental right" at issue is Martha Wright's right to work in a particular unit of the hospital. However, Martha Wright has no protected property or liberty interest to work in a particular unit of the hospital. *See Board of Regents v. Roth*, 408 U.S. 564 (1972); *see also Sullivan v. Brown*, 544 F.2d 279 (6th Cir. 1976).[6]

Accordingly, MetroHealth's motion for summary judgment on the § 1983 claim is appropriate.

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[5]MetroHealth offered to transfer Martha Wright to another unit of the hospital with the same grade and pay.

[6]MetroHealth further notes that although they have made exceptions to the nepotism policy, none of the instances cited by the plaintiffs involve contact between married persons under the "constant emergency conditions and severe time restraints" involved in the Life Flight unit.

D.

Plaintiffs' pendent state claims are without merit. In Count I, plaintiffs charge that MetroHealth tortiously interfered with John Wright's business relationship with PHI, his employer. However, MetroHealth and PHI were parties to a contract and have a common business interest. Therefore, MetroHealth's request to PHI to transfer John Wright is subject to a qualified privilege. *See Smith v. Klein*, 23 Ohio App.3d 146, 492 N.E.2d 164 (8th Dist. App. 1985); *Hahn v. Kotten*, 43 Ohio St.2d 237, 351 N.E.2d 713 (1973). There is no evidence of malicious intent, only that MetroHealth wanted to enforce its nepotism policy.[7]
Count II alleges intentional infliction of emotional distress. The tort of intentional infliction of emotional distress requires "extreme and outrageous conduct" on the part of the defendants. *See Hawley v. Dresser Industries, Inc.*, 737 F.Supp. 445 (S.D. Ohio 1990). Plaintiffs admit that when they announced their marriage, MetroHealth offered to transfer Martha to a comparable position in the hospital. The enforcement of the nepotism policy to the plaintiffs does not constitute such "extreme and outrageous conduct" to state a claim for intentional infliction of emotional distress.

In Count III, plaintiffs allege a breach of Ohio public polic · They argue that Ohio has a "strong public policy favoring marriage" as opposed to cohabitation. However, as discussed above, nepotism policies primarily concern conditions of employment, not marriage. *Parsons v. County of Del Norte*, 728 F.2d at 1237. Accordingly, plaintiffs have not stated a claim for a breach of Ohio public policy.

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[7]Furthermore, plaintiffs' charge of tortious interference with a business relationship is moot because PHI is no longer threatening to relocate John Wright.

Count IV alleges sex discrimination in violation of O.R.C. § 4112.99. Plaintiffs do not allege that MetroHealth has applied its nepotism policy only to female employees who marry employees of companies under contract with MetroHealth. Because, there is no allegation that MetroHealth is applying its nepotism policy to Martha Wright because of her sex, Count IV is dismissed.

Accordingly, MetroHealth's motion for summary judgment on plaintiffs' § 1983 claim is granted. Furthermore, MetroHealth and PHI's motions to dismiss plaintiffs' state claims are both granted.

IT IS SO ORDERED.

/s: John M. Manos/
UNITED STATES DISTRICT JUDGE

No. 94-3548

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARTHA SABOL WRIGHT; JOHN C. WRIGHT, JR.,
Plaintiffs-Appellants,

v.

METROHEALTH MEDICAL CENTER,
Defendant-Appellee,

Petroleum Helicopters, Inc.,
Defendant.

On Appeal from the United States District Court
for the Northern District of Ohio

Decided and Filed July 13, 1995.

Before: MILBURN and BATCHELDER, Circuit Judges; TODD, District Judge.*

MILBURN, Circuit Judge.

Plaintiffs Martha Sabol Wright and John C. Wright, Jr. appeal the district court's order granting summary judgment to defendant MetroHealth Medical Center ("MetroHealth") in this 42 U.S.C. § 1983 action in which plaintiffs allege that the application of defendant

MetroHealth's nepotism policy to plaintiffs violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. Plaintiffs also appeal the district court's order granting defendant MetroHealth's and Petroleum Helicopters, Inc.'s ("PHI") motions to dismiss plaintiffs' state law claims pursuant to Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 12(b)(6). On appeal, the issues are (1) whether the district court erred in finding that MetroHealth's nepotism policy did not violate plaintiffs' fundamental right to marry, and (2) whether the district court erred in dismissing plaintiffs' state law claims. For the reasons that follow, we affirm.

I.

A.

Plaintiff Martha Sabol Wright has been employed as a registered nurse by defendant MetroHealth, a public hospital that is located in Cuyahoga County, Ohio, since October 1984.[1] Pursuant to a contract with MetroHealth, defendant PHI[2] provides helicopters and pilots to MetroHealth for its emergency airlift medical service, LifeFlight. Plaintiff John C. Wright, Jr. has been employed by PHI as a helicopter pilot since 1985.

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*The Honorable James D. Todd, United States District Judge for the Western District of Tennessee, sitting by designation.

[1]MetroHealth is a county hospital operating under Chapter 339 of the Ohio Revised Code. As such, it is subject to the mandates of the Constitution and 42 U.S.C. § 1983.

[2]During the pendency of this appeal, defendant PHI settled its claims with plaintiffs and is no longer a party to this appeal.

Each LifeFlight helicopter is staffed with two PHI pilots, a MetroHealth doctor, and a MetroHealth registered nurse. In March 1990, Martha was assigned to the LifeFlight unit in which John is a pilot. In October 1991, Martha and John became engaged, and in December 1991, they began cohabitating. Soon thereafter, Martha and John informed their respective employers of their living situation and their intentions to be married. On November 17, 1992, MetroHealth informed plaintiffs that as a married couple in the same unit, they would be in violation of MetroHealth's nepotism policy and that one of them would have to transfer to another unit.

MetroHealth's nepotism policy states in relevant part as follows:

> IX. NEPOTISM
>
> A. In order to prevent conflicts which may arise in situations where members of the same immediate family are employed by the Hospital, the Hospital will not allow an individual to be employed, transferred or promoted, where as a result, any of the following situations would exist: ...
>
> > 3. Members of the same immediate family being in positions which are of such close proximity that they would necessarily interact with each other in the performance of their duties ...
>
> C. If, as a result of a marriage between two employees, a violation of the Nepotism guidelines arises, the affected employees will be given the option of electing which spouse will be moved to another position in the Hospital System so as to

> eliminate the nepotism violation. If no election is made by either spouse in thirty (30) calendar days after notice to the employees, the least senior in terms of Hospital seniority will be moved. All reasonable attempts will be made to insure that the displaced employee is given a position of comparable responsibility and pay.

J.A. 25-26. MetroHealth offered to transfer Martha to any available position of the same grade and pay in another unit, but she refused. Plaintiffs were married on December 19, 1992. On December 20, 1992, MetroHealth requested that PHI transfer John from the LifeFlight crews, and the next day, PHI informed John that he was being transferred, effective January 19, 1993, to Louisiana.

B.

On January 13, 1993, plaintiffs filed this action in the Court of Common Pleas of Cuyahoga County, Ohio, naming MetroHealth and PHI as defendants. In their complaint, plaintiffs alleged that MetroHealth's application of its nepotism policy to plaintiffs violated the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States in violation of 42 U.S.C. § 1983. Plaintiffs also alleged that (1) MetroHealth tortiously interfered with John's business relationship with PHI, (2) that MetroHealth's and PHI's conduct constituted intentional infliction of emotional distress, (3) that MetroHealth's and PHI's conduct violated Ohio public policy, and (4) that MetroHealth's and PHI's conduct constituted sex discrimination in violation of Ohio Revised Code ("O.R.C.") § 4112.99. Defendants removed the action to federal court on January 15, 1993.

After this action was filed, defendants agreed not to transfer John, but instead, to transfer Martha to another unit of the hospital. The parties also agreed that during the pendency of the trial, MetroHealth would not transfer Martha from the LifeFlight unit. In that regard, MetroHealth scheduled Martha's assignments so that Martha and John did not fly together in the same helicopter.

On January 25, 1993, MetroHealth moved to dismiss the case pursuant to Fed.R.Civ.P. 12(b)(6), and on February 8, 1993, PHI filed a similar motion. Thereafter, the parties engaged in extensive settlement discussions that resulted in a stipulated settlement on April 20, 1993. However, the parties were unable to finalize the settlement, and on May 12, 1993, plaintiffs sought to vacate the settlement and reopen the proceedings.

On May 27, 1993, MetroHealth filed a supplemental brief in support of its motion to dismiss and its alternative motion for summary judgment with regard to plaintiffs' 42 U.S.C. § 1983 claim. On January 11, 1994, plaintiffs filed a cross-motion for partial summary judgment against MetroHealth on their § 1983 claim. The district court officially vacated the settlement and reopened the case on January 12, 1994. On April 25, 1994, the district court granted MetroHealth's motion for summary judgment with regard to plaintiffs' 42 U.S.C. § 1983 claim. The district court also granted MetroHealth's and PHI's motions to dismiss plaintiffs' state law claims. This timely appeal followed.

II.

Plaintiffs argue that the district court erred in granting summary judgment to MetroHealth as to plaintiffs' 42 U.S.C. § 1983 claim. "We review a district court's grant

of summary judgment de novo." *Brooks v. American Broadcasting Cos.*, 932 F.2d 495, 500 (6th Cir.1991). We will affirm a district court's order granting summary judgment "only if we determine that the pleadings, affidavits, and other submissions show 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Michigan Protection & Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 341 (6th Cir.1994) (quoting Fed.R.Civ.P. 56(c)). All evidence must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). However, "[t]he moving party need not support its motion with evidence disproving the non-moving party's claim, but need only show that 'there is an absence of evidence to support the non-moving party's case.'" *Babin*, 18 F.3d at 341 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986)).

A.

First, plaintiffs argue that MetroHealth's nepotism policy violates their fundamental right to marry and that the district court erred in failing to subject the nepotism policy to strict scrutiny review.[3] Plaintiffs assert that the district court improperly focused exclusively on whether MetroHealth's nepotism policy violated plaintiffs'

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[3]Plaintiffs also argue that MetroHealth's nepotism policy infringes upon their First Amendment right to freedom of association. *See Adkins v. Board of Education of Magoffin County*, 982 F.2d 952 (6th Cir.1993); *Newsom v. Norris*, 888 F.2d 371 (6th Cir.1989). However, plaintiffs failed to raise this issue before the district court and thus, have not preserved the issue for appeal. *Noble v. Chrysler Motors Corp., Jeep Div.*, 32 F.3d 997, 1002 (6th Cir.1994) (holding that absent exceptional circumstances, courts will not normally address an issue not first raised in the district court).

employment rights and failed to consider whether the policy violated plaintiffs' fundamental right to marry. Plaintiffs rely on *Littlejohn v. Rose*, 768 F.2d 765 (6th Cir.1985), *cert. denied*, 475 U.S. 1045, 106 S.Ct. 1260, 89 L.Ed.2d 570 (1986), wherein we held that the district court erred in holding that the plaintiff had failed to state a viable constitutional claim where the plaintiff's employment contract had not been renewed after it expired because of the plaintiff's involvement in a divorce. *Littlejohn*, 768 F.2d at 768. The district court reasoned that although the plaintiff could not be fired for this reason, she had failed to state a constitutional claim because she did not have a property right in her job. *Id.* at 769. We held that a person may not be denied public employment because of a constitutionally protected activity regardless of whether a person has a property right in his or her job. *Id.* However, plaintiffs' reliance on *Littlejohn* is misplaced. In this case, the district court first evaluated whether MetroHealth's nepotism policy directly and substantially interfered with plaintiffs' right to marry. Upon concluding that it did not, the district court then determined that plaintiffs did not have a protected property or liberty interest in their jobs. Therefore, unlike the district court in *Littlejohn*, the district court in this case did not hold that plaintiffs were foreclosed from arguing that their fundamental right to marry had been violated *because* it found that plaintiffs did not have a property or liberty interest in their particular positions. Accordingly, we conclude that the district court properly considered whether MetroHealth's nepotism policy infringed upon plaintiffs' fundamental right to marry.

In evaluating the constitutionality of MetroHealth's nepotism policy, " 'we must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected.'" *Zablocki v. Redhail*, 434 U.S. 374, 383,

98 S.Ct. 673, 679, 54 L.Ed.2d 618 (1978) (quoting *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 253, 94 S.Ct. 1076, 1080, 39 L.Ed.2d 306 (1974)). It is well established that the right to marry is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. *See*, e.g., *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2805, 120 L.Ed.2d 674 (1992); *Zablocki*, 434 U.S. at 383-85, 98 S.Ct. at 679-81; *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); *Littlejohn*, 768 F.2d at 768. Furthermore, the Supreme Court has held that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388, 98 S.Ct. at 682. However, the Court has also held that not every state action "which relates in any way to the incidents of or the prerequisites for marriage must be subjected to rigorous scrutiny." *Id.* at 386, 98 S.Ct. at 681. "To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may be imposed." *Id.* Therefore, in order to determine whether we review MetroHealth's nepotism policy under a strict scrutiny or a rational basis analysis, we must determine whether MetroHealth's nepotism policy "significantly interfere[s]" with the decision to marry. See *Parks v. City of Warner Robins*, Georgia, 43 F.3d 609, 613 (11th Cir.1995). Thus, we turn to prior Supreme Court cases discussing the right to marry for guidance.

In *Loving*, the Supreme Court held that an anti-miscegenation statute, which voided interracial marriages and made them punishable as felonies, violated the "freedom of choice to marry." *Loving*, 388 U.S. at 12, 87 S.Ct. at 1823. Similarly, in *Zablocki*, the Court invalidated a Wisconsin statute that provided that any resident who had child support obligations must obtain a court order before

he or she could marry. *Zablocki*, 434 U.S. at 387, 390-91, 98 S.Ct. at 681, 683-84. The Court held that the statute, which voided marriages contracted in any jurisdiction without the required court order and subjected violators to criminal punishment, was an impermissible direct restraint on the right to marry. Id. at 375, 387, 390-91, 98 S.Ct. at 675, 681, 683-84. In holding that the statutory classification at issue in *Zablocki* interfered "directly and substantially with the right to marry[,]" the Court explained:

> Some of those in the affected class ... will never be able to obtain the necessary court order.... These persons are absolutely prevented from getting married. Many others, able in theory to satisfy the statute's requirements will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry.

Zablocki, 434 U.S. at 387, 98 S.Ct. at 681.

On the other hand, in the same term that the Court decided *Zablocki*, the Court upheld a Social Security provision that terminated benefits to a secondary beneficiary if he or she married a person ineligible for Social Security benefits. *Califano v. Jobst*, 434 U.S. 47, 98 S.Ct. 95, 54 L.Ed.2d 228 (1977). In *Zablocki*, the Court distinguished the situation in *Jobst* explaining:

> The directness and substantiality of the interference with the freedom to marry distinguish the instant case from ... [*Jobst*]. The Social Security provisions placed no direct legal obstacle in the path of persons desiring to get married, and ... there was no evidence that the laws significantly discouraged, let alone made "practically impossible," any marriages.

Zablocki, 434 U.S. at 387-88 n.12, 98 S.Ct. at 681-82 n.12 (citation omitted).

In *Parks v. City of Warner Robins*, Georgia, the Eleventh Circuit held that the City's anti-nepotism policy did not directly and substantially interfere with the right to marry. *Parks*, 43 F.3d at 614. The court explained that "[t]he [anti-nepotism] policy does not create a direct legal obstacle that would prevent absolutely a class of people from marrying. While the policy may place increased economic burdens on certain city employees who wish to marry one another, the policy does not forbid them from marrying." *Id.* The court further stated, "Any increased economic burden created by the anti-nepotism policy is no more than an incidental effect of a policy aimed at maintaining the operational efficiency of Warner Robins' governmental departments, not a direct attempt to control the marital decisions of city employees." *Id.*; *see Parsons v. County of Del Norte*, 728 F.2d 1234, 1237 (9th Cir.) (per curiam) (holding that City's no-nepotism rule did not threaten or unduly burden the plaintiff's right to marry or remain married), *cert. denied*, 469 U.S. 846, 105 S.Ct. 158, 83 L.Ed.2d 95 (1984); *Cutts v. Fowler*, 692 F.2d 138 (D.C.Cir.1982) (holding that the burden on the right to marry caused by anti-nepotism rules is "attenuated and indirect"). "Moreover, individual instances of hardship notwithstanding, the anti-nepotism policy at issue here does not make marriage practically impossible for a particular class of persons." *Parks*, 43 F.3d at 614; *see Jobst*, 434 U.S. at 54.

We adopt the reasoning of the Eleventh Circuit in *Parks*. MetroHealth's nepotism policy does not create a legal obstacle that would prevent a class of people from marrying. The fact that plaintiffs married with knowledge of the nepotism policy illustrates this point. Furthermore, we note

that MetroHealth's nepotism policy merely requires that one spouse transfer to another department; it does not require one spouse to be terminated when the policy is violated. Therefore, we conclude that MetroHealth's nepotism policy does not directly and substantially interfere with the fundamental right to marry, and thus, we hold that the district court did not err in subjecting the policy to rational basis scrutiny.[4]

Second, plaintiffs argue that the district court erred in finding that MetroHealth's nepotism policy was rationally related to a legitimate government interest. "Under this analysis, an ordinance or regulation is invalid if it fails to advance a legitimate governmental interest or if it is an unreasonable means of advancing a legitimate governmental interest." *Curto v. City of Harper Woods*, 954 F.2d 1237, 1243 (6th Cir.1992) (per curiam) (citing *Williamson v. Lee Optical*, 348 U.S. 483, 487-88, 75 S.Ct. 461, 464-65, 99 L.Ed. 563 (1955)). However, the state actor "need not show that its

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[4]Plaintiffs argue that MetroHealth's nepotism policy also infringes upon their fundamental right to work. The Supreme Court has held that the "freedom to choose and pursue a career" is a protected liberty interest. *Parate v. Isibor*, 868 F.2d 821, 831 (6th Cir.1989) (citing Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923)). *In Parate*, we held that the right to pursue a career was not implicated when the plaintiff was terminated because the plaintiff was free to work at other universities. *Parate*, 868 F.2d at 832. Similarly, in *Sullivan v. Brown*, 544 F.2d 279 (6th Cir.1976), we held that the transfer of a tenured teacher did not implicate her liberty interest under the Fourteenth Amendment. *Sullivan*, 544 F.2d at 283. In this case, MetroHealth merely wished to transfer one spouse from its LifeFlight unit. Plaintiffs were not in any way foreclosed from pursuing their careers with defendants. Thus, we conclude that MetroHealth's nepotism policy did not infringe upon the right of plaintiffs to pursue their careers.

ordinance provides the best means for achieving its stated ends, only that these means are rational in view of its goals." *Interstate Towing Ass'n v. City of Cincinnati, Ohio*, 6 F.3d 1154, 1166 (6th Cir.1993). Moreover, the state actor is not required to state the purpose of its ordinance or regulation if the reviewing court may glean these reasons from the record. "Such supposition is adequate for purposes of performing [a rationally related analysis]." *Curto*, 954 F.2d at 1243.

MetroHealth states that its nepotism policy is necessary to (1) avoid potential conflicts that might arise when two closely related persons allow their personal lives to impinge on their professional lives, and (2) prevent morale among other workers from deteriorating due to the unique relationship between the married co-workers. We agree with the district court that these reasons provide a rational basis for MetroHealth's nepotism policy that furthers a legitimate governmental interest.[5] We also note

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[5]Plaintiffs argue that the district court erred in failing to require that MetroHealth provide a factual basis showing that its nepotism policy is rationally related to the stated interests of avoiding conflicts of interests and preventing a deterioration in morale. In support of this proposition, plaintiffs rely on *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977), *EEOC v. The Rath Packing Co.*, 787 F.2d 318 (8th Cir.), *cert. denied*, 479 U.S. 910, 107 S.Ct. 307, 93 L.Ed.2d 282 (1986), and *Meinhold v. United States Dep't of Defense*, 808 F.Supp. 1455 (C.D.Cal.1993), *aff'd in part, vacated in part*, 34 F.3d 1469 (9th Cir.1994). However, *Dothard* and *Rath Packing* are Title VII cases, and plaintiffs' reliance on these cases is misplaced because plaintiffs do not argue that MetroHealth's nepotism policy has a disparate impact on a protected group. Similarly, plaintiffs' reliance on *Meinhold* is also misplaced. In *Meinhold*, the district court relied on *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir.1991) (order), *cert. denied*, --- U.S. ----, 113 S.Ct. 655, 121 L.Ed.2d 581 (1992), wherein the Ninth Circuit applied "active" rational basis scrutiny pursuant to which a

(continued...)

that many other circuits have held that various nepotism policies furthered legitimate governmental interests and thus met rational basis scrutiny. *See*, e.g., *Parks*, 43 F.3d at 615 (upholding under a rational basis scrutiny an anti-nepotism policy as a means of "avoiding conflicts of interests between work-related and family-related obligations; reducing favoritism or even the appearance of favoritism; preventing family conflicts from affecting the workplace; and, by limiting inter-office dating, decreasing the likelihood of sexual harassment in the workplace"); *Parsons*, 728 F.2d at 1237 (holding that an anti-nepotism statute is rationally related to the government interests of avoiding conflicts of interest and favoritism); *Cutts*, 692 F.2d at 141 (same).[6]

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[5](...continued)
court reviews "*to see whether the government had established on the record* a rational basis for the challenged discrimination." *Pruitt*, 963 F.2d at 1166 (emphasis in original). However, in *Pruitt*, the court explained that this standard applied to cases involving discrimination. *Id.* at 1165 (holding that discriminatory classification of homosexuals violated the Equal Protection Clause). In this case, plaintiffs do not allege that MetroHealth's nepotism policy was based on discriminatory motives. Thus, we conclude that the district court did not err in finding that MetroHealth's nepotism policy advanced the interests put forth by MetroHealth.

[6]Plaintiffs also argue that the actual purpose of MetroHealth's nepotism policy is administrative ease and convenience. Relying on *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), plaintiffs assert that the policy is unconstitutional because the Supreme Court has held that administrative ease and convenience is not a legitimate governmental interest. *Craig*, 429 U.S. at 198, 97 S.Ct. at 457. However, *Craig*, which dealt with gender-based classifications that require a more stringent standard of review, is inapposite to this case. Moreover, MetroHealth does not argue that it implemented its nepotism policy for administrative ease and convenience; rather, MetroHealth asserts that its nepotism policy
(continued...)

Plaintiffs further argue that MetroHealth's nepotism policy is not a reasonable means of advancing its stated purpose. In other words, plaintiffs assert that MetroHealth's application of its nepotism policy contradicts the policy's stated goals. Specifically, plaintiffs allege that "MetroHealth's sporadic and selective application of the Nepotism Policy belies the need for the policy and clearly proves that the hospital can, and does, function efficiently and effectively *without* such a policy and without compromising patient care or safety." Plaintiffs' Brief at 21 (emphasis in original).[7] In support of this contention, plaintiffs note that MetroHealth has failed to take action against several alleged violations of its nepotism policy. Thus, plaintiffs argue that this proves that these alleged

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[6](...continued)
furthers the legitimate governmental interest of avoiding conflicts of interest and preventing morale problems.

[7]It is not clear whether plaintiffs argue on appeal that MetroHealth's selective enforcement of its nepotism policy violates the Equal Protection Clause. *See* Plaintiffs' Brief at 21 n. 15; Plaintiffs' Reply Brief at 5. Nonetheless, this argument is meritless. Selective enforcement of a facially constitutional regulation does not, by itself, violate equal protection. *Wayte v. United States*, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985); *Birth Control Centers, Inc. v. Reizen*, 743 F.2d 352, 359 (6th Cir.1984). "A claim of selective application of a facially lawful state regulation requires a showing that ... the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person." *FSK Drug Corp. v. Perales*, 960 F.2d 6, 10 (2d Cir.1992). Because plaintiffs do not allege invidious discrimination because of an impermissible consideration or that MetroHealth acted in bad faith, we conclude that the district court did not err in granting summary judgment to MetroHealth on this basis.

violations have not disrupted the hospital and dispute MetroHealth's rationale for its nepotism policy.

MetroHealth determines whether a relationship violates its nepotism policy on a case-by-case basis. When faced with a possible violation of the nepotism policy, MetroHealth's Vice President of Human Resources analyzes whether family members work in "close proximity" to each other, and whether a family member supervises another family member. Because this determination is subjective, some spouses are permitted to work together. In addition, MetroHealth admitted that it became aware during discovery of violations of its policy of which it had previously been unaware. However, these facts do not show that MetroHealth's nepotism policy is not rationally related to the legitimate governmental interests of avoiding conflicts of interests and preventing morale problems. MetroHealth explains that because of "[t]he high-pressure, high-profile, high-stakes nature of the LifeFlight unit," MetroHealth is more greatly concerned with nepotism violations in this unit than in any other unit or department in the hospital. Defendant's Brief at 19. Thus, consistent with the governmental interests behind the nepotism policy, MetroHealth may rationally determine that under certain circumstances, a married couple working in the same unit or department would not violate its nepotism policy. Therefore, we conclude that MetroHealth's nepotism policy, which prevents spouses from working together in the same unit, is rationally related to the legitimate governmental interest of avoiding conflicts of interest and preventing harm to the morale of other employees.

Likewise, we find no merit in plaintiffs' argument that MetroHealth's application of its nepotism policy to plaintiffs does not further MetroHealth's goals because plaintiff John C. Wright, Jr. is not an employee of MetroHealth. Plaintiffs

assert that their marriage does not implicate the concerns that the nepotism policy is intended to address because they are not both employed by MetroHealth. However, this fact does not diminish MetroHealth's concern that married couples might "allow their personal lives to impinge on their professional lives." Defendant's Brief at 18. Therefore, we conclude that because plaintiffs' work in the same unit, MetroHealth's concerns regarding married couples who work together are equally valid in this case.[8] Accordingly, we

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[8]Plaintiffs also argue that even if the MetroHealth's nepotism policy does not violate their fundamental right to marry, the district court erred in finding that MetroHealth's nepotism policy was applicable to plaintiff John C. Wright, Jr. Specifically, plaintiffs assert that because John is an employee of PHI, and not an employee of MetroHealth, plaintiffs' marriage does not violate MetroHealth's nepotism policy, which prohibits members of the same immediate family who are "employed by the Hospital" from working together in close proximity. J.A. 26.

However, as noted by the district court, the contract between MetroHealth and PHI stipulates that PHI employees will conform to MetroHealth rules. Thus, John is subject to MetroHealth's nepotism policy pursuant to the contract. Furthermore, even assuming arguendo that MetroHealth's nepotism policy does not specifically apply to John, MetroHealth may transfer plaintiff Martha Sabol Wright based on the same policy concerns that caused it to promulgate its nepotism policy pursuant to its Policy No. II-6, which states:

> III. TRANSFERS
>
> A. Employees may be transferred within their job classification to another department, nursing unit or shift anywhere within a medical center unit for reasons of meeting patient care needs, efficiency, economy, or other good reason.

J.A. 135.

hold that the district court did not err in concluding that MetroHealth's nepotism policy passed constitutional muster.

B.

Plaintiffs argue that the district court erred in dismissing their pendent state law claims pursuant to Fed.R.Civ.P. 12(b)(6). We review the district court's grant of a motion to dismiss de novo. *Cameron v. Seitz*, 38 F.3d 264, 270 (6th Cir.1994). In this regard, we accept the allegations contained in the plaintiff's complaint as true. *Walker Process Equip. Inc. v. Food. Mach. and Chem. Corp.*, 382 U.S. 172, 174-75, 86 S.Ct. 347, 348-49, 15 L.Ed.2d 247 (1965); *Carlson v. Conklin*, 813 F.2d 769, 772 (6th Cir.1987). " '[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Cameron*, 38 F.3d at 270 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)). In considering a motion under Fed.R.Civ.P. 12(b)(6), it is not the function of the court to weigh the evidence or evaluate the credibility of witnesses, id.; instead, the court "must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir.1993). A district court may not grant dismissal under Fed.R.Civ.P. 12(b)(6) merely because it does not believe the factual allegations of the complaint. *Allard*, 991 F.2d at 1240.

(1)

Plaintiffs argue that the district court erred in dismissing their tortious interference with a business relationship claim. Under Ohio law, a cause of action for [tortious interference with business relations] is made out when

> "... one who, *without a privilege to do so*, induces or otherwise purposely causes a third party not to enter into, or continue, a business relationship with another, or perform a contract with another...."

Smith v. Klein, 23 Ohio App.3d 146, 148 n.1, 492 N.E.2d 852 (1985) (quoting *Juhasz v. Quik Shops, Inc.*, 55 Ohio App.2d 51, 57, 379 N.E.2d 235 (1977) (emphasis added)); *see Candenn Pharmacal v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 601 (6th Cir.1988). However, "in Ohio, 'one is privileged to purposely cause another not to perform a contract with a third person where he in good faith is asserting a legally protected interest of his own, which he believes will be impaired or destroyed by the performance of the contract.' " *Candenn Pharmacal*, 862 F.2d at 601 (quoting *Pearse v. McDonald's Systems of Ohio, Inc.*, 47 Ohio App.2d 20, 351 N.E.2d 788 (1975)). The factors determining whether a privilege exists are as follows:

> (a) the nature of the actor's conduct,
>
> (b) the nature of the expectancy with which his conduct interferes,
>
> (c) the relations between the parties,

(d) the interests sought to be advanced by the actor and

(e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand.

Heheman v. E.W. Scripps Co., 661 F.2d 1115, 1127 (6th Cir.1981); *Juhasz*, 55 Ohio App.2d at 57, 379 N.E.2d 235.

In their complaint, plaintiffs alleged that PHI and MetroHealth have a contract pursuant to which PHI provides MetroHealtn with helicopters and pilots for its LifeFlight unit. Plaintiffs further alleged that "[t]he contract allows Metro to reject a pilot initially offered by PHI, but does not provide Metro with the right to remove or terminate PHI pilots." J.A. 16. In addition, plaintiffs alleged that MetroHealth requested that PHI transfer plaintiff John C. Wright, Jr. from the LifeFlight unit due to MetroHealth's belief that plaintiffs' marriage violated MetroHealth's nepotism policy.

We conclude that MetroHealth was privileged to request that PHI transfer plaintiff John C. Wright, Jr. from the LifeFlight unit by virtue of its contract with PHI. Pursuant to this contract, PHI supplied pilots to MetroHealth for its LifeFlight unit. Thus, MetroHealth had an interest in the employees that PHI provided MetroHealth. We note that plaintiffs did not allege that the contract forbade MetroHealth from requesting that an unsatisfactory pilot be removed from the LifeFlight crews. Therefore, we conclude that the district court did not err in dismissing plaintiffs' claim for tortious interference with a business relationship.

(2)

Plaintiffs also argue that the district court erred in dismissing their claim for intentional infliction of emotional distress. The Supreme Court of Ohio has defined the tort of intentional infliction of emotional distress as follows:

> "One who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

Russ v. TRW, Inc., 59 Ohio St.3d 42, 47, 570 N.E.2d 1076 (1991) (quoting *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 374, 453 N.E.2d 666 (1983)). Furthermore, "liability [for intentional infliction of emotional distress] has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Yeager*, 6 Ohio St.3d at 375, 453 N.E.2d 666. Moreover, we have noted that the Ohio Supreme Court has defined "serious" emotional distress in the following manner:

> "Serious emotional distress describes emotional injury which is both severe and debilitating. Thus, serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case."

Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 317 (6th Cir.1989) (quoting *Paugh v. Hanks*, 6 Ohio St.3d 72, 72, 451 N.E.2d 759 (1983) (quoting syllabus)). "Conversely, the Ohio Supreme Court has expressly indicated that '[t]he liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities ... [and that] [t]here is no occasion for the law to intervene in

every case where someone's feelings are hurt.'" *Gagne*, 881 F.2d at 317-18 (quoting *Reamsnyder v. Jaskolski*, 10 Ohio St.3d 150, 153, 462 N.E.2d 392 (1984)).

In this case, plaintiffs merely allege that defendant MetroHealth requested that PHI transfer plaintiff John C. Wright, Jr. from the LifeFlight unit due to its belief that plaintiffs' marriage violated their nepotism policy. Moreover, plaintiffs do not allege that they suffered any serious emotional distress. We agree with the district court that "[t]he enforcement of the nepotism policy to the plaintiffs does not constitute such 'extreme and outrageous conduct' to state a claim for intentional infliction of emotional distress." J.A. 216.

(3)

Finally, plaintiffs argue that the district court erred in dismissing their breach of Ohio public policy claim. Plaintiffs assert that "[d]efendant MetroHealth's efforts to remove John (or Martha) from their respective positions because of their marriage is contrary to Ohio's express policy favoring marriage." Plaintiffs' Brief at 36.

Under Ohio law, a cause of action arises when an employee is discharged or disciplined for a reason that breaches public policy. *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St.3d 228, 234, 551 N.E.2d 981 (1990). The Supreme Court of Ohio has held open the possibility that it might recognize a public policy exception to the at-will doctrine that is not proscribed by statute; however, the court stated that the exception "would be required to be of equally serious import as the violation of a statute." *Id.* at 235.

In this case, plaintiffs claim that MetroHealth's nepotism policy violates Ohio public policy that strongly prefers marriage to cohabitation. However, as discussed earlier, we have concluded that MetroHealth's nepotism policy does not directly or substantially interfere with the right to marry. Furthermore, we find nothing in Ohio law that shows that nepotism policies violate Ohio public policy. Therefore, we conclude that plaintiffs failed to state a claim for breach of Ohio public policy. Accordingly, we hold that the district court did not err in dismissing plaintiffs' pendent state law claims.

III.

For the reasons stated, the judgment of the district court is AFFIRMED.

No. 94-3548

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARTHA SABOL WRIGHT, et al.,
Plaintiff-Appellants,

v.

METROHEALTH MEDICAL CENTER,
Defendant-Appellee.

ORDER

BEFORE: MILBURN and BATCHELDER, Circuit Judges; and TODD,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vot on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and the decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/S/
Leonard Green, Clerk

* Hon. James D. Todd, United States District Judge for the Western District of Tennessee sitting by designation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN C. WRIGHT, JR., Plaintiff,	No. 1:95CV2412
vs.	Judge Matia
PETROLEUM HELICOPTERS, INC., *et al.*, Defendants.	

This action came on by suggestion of the Plaintiff, John C. Wright, Jr., for an order dismissing this action. The Court finds that the federal constitutional claims set forth in the complaint are controlled by the decision of the United States Court of Appeals for the Sixth Circuit in *Wright, et al. v. MetroHealth, et al.*, 58 F. 3d 1130 (1995)[*Wright I*]. Under the decision in *Wright I* the challenged Nepotism Policy is constitutional. Thus, the complaint fails to state a claim upon which relief can be granted and accordingly the complaint must be dismissed. Rule 12(b)(6), Federal Rules of Civil Procedure.

IT IS HEREBY ORDERED that this case is dismissed without prejudice to any claims or defenses which are now pending in the Court of Common Pleas, Cuyahoga County, Ohio in Case Number 292123. Dated this 17th day of Nov., 1995.

United States District Judge

Supreme Court, U.S.
FILED
JAN 23 1996
CLERK

No. 95-848

In The

Supreme Court of the United States

October Term, 1995

MARTHA SABOL WRIGHT and JOHN C. WRIGHT, JR.,

Petitioners,

vs.

METROHEALTH MEDICAL CENTER, PETROLEUM HELICOPTERS, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS METROHEALTH MEDICAL CENTER, WILLIAM FALLON, BETTY KOVACH AND CHARLENE MANCUSO

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QUESTIONS PRESENTED

1. Whether every federal court to address the issue has properly determined that narrowly drawn anti-nepotism policies survive equal protection challenges under the authority of this Court's holdings in *Zablocki v. Redhail*, 434 U.S. 374 (1978) and *Califano v. Jobst*, 434 U.S. 47 (1977)?

2. Whether a petitioner properly invokes the jurisdiction of this honorable Court to challenge the termination from employment of a helicopter pilot for failing to respond to an emergency medical call where absolutely no record evidence supports the claim that this termination was connected in any way to enforcement of a nepotism policy, where the parties have had no ability to develop any record on this issue, where a state court action challenging the termination is pending and where the United States Court of Appeal for the Sixth Circuit is yet to rule on the appeal of the federal action challenging this termination?

3. Whether petitioners can properly challenge an anti-nepotism policy on First Amendment grounds where such challenge was at no time raised before the trial court?

LIST OF PARTIES

The Petitioners are Martha Sabol Wright and John C. Wright, Jr.

The Respondents are MetroHealth Medical Center, a county-owned hospital in Cleveland, Ohio, and three (3) individuals employed by MetroHealth Medical Center, William Fallon, Betty Kovach and Charlene Mancuso. Other Respondents include Petroleum Helicopters, Inc., a private corporation, and Wayne Thompson, an individual employed by Petroleum Helicopters, Inc.

Respondents Fallon, Kovach and Mancuso were not parties to the original action that resulted in the decision of the U.S. Court of Appeals for the Sixth Circuit, which has been appealed herein (*See Wright v. MetroHealth Medical Center*, 58 F.3d 1130 (6th Cir. 1995).) They have been named as parties to a second action which remains pending in the Sixth Circuit and has been assigned Case No. 95-4260. Accordingly, Respondents respectfully suggest that Dr. Fallon, Ms. Mancuso and Ms. Kovach are not properly named as potential Respondents in this appeal.

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CONSTITUTIONAL PROVISIONS INVOLVED

Respondents agree with Petitioners statement that the Equal Protection clause of the Fourteenth Amendment is the constitutional provision involved in this matter. However, Respondents object to Petitioners' inclusion of the First Amendment as a constitutional provision involved in this matter. Petitioners never raised a First Amendment challenge to the anti-nepotism policy before the lower court. The issue was raised, for the first time, on appeal. Accordingly, the Sixth Circuit did not opine on the First Amendment argument, stating that "Plaintiffs failed to raise this issue before the District Court and thus have not preserved the issue for appeal." (*See* Appendix 1, Petitioners' Writ at p. 16a at n. 3).

COUNTER-STATEMENT OF THE CASE

Respondents, MetroHealth Medical Center, William Fallon, Betty Kovach and Charlene Mancuso (hereinafter collectively referred to as "Respondents MetroHealth" or "Respondents") rely on the Statement of Facts as set forth in decision of the Sixth Circuit in *Wright v. MetroHealth Medical Center*, 58 F.3d 1130 (6th Cir. 1995). (*See* Appendix 2, Petitioner's Writ, pp. 11a - 32a).

However, Respondents vigorously object to references of Petitioner John Wright's dismissal. Petitioners apparently premise their appeal upon the unsupported proposition that John Wright was discharged from employment pursuant to Respondents' nepotism policy. This assertion is not part of the record before this Court, and is blatantly untrue. During the pendency of the initial Sixth Circuit appeal, and before the Sixth Circuit issued the opinion upholding the propriety of the nepotism policy at issue, Petitioner John Wright was discharged by Respondent PHI, for failing and refusing to respond to an

emergency medical call in his helicopter. Although Petitioners' case is certainly more dramatic if they can allege that Mr. Wright was discharged because of his marriage to Martha Wright, this fact is blatantly untrue and nowhere developed in the record before this Court. The actual facts of record are as follows.

Respondent MetroHealth Medical Center has an anti-nepotism policy which, in pertinent part, precludes married couples from working "in close proximity". It is hard to imagine a working situation involving closer proximity than an emergency nurse and helicopter pilot working together in an emergency life flight situation. Accordingly, when MetroHealth learned of the pending marriage, Martha Wright, an at-will employee of the Hospital, was offered a transfer to any other Hospital nursing position, of her choosing. She refused, and accordingly, her husband was informed that his employer (PHI) would transfer him from his assignment at MetroHealth in order to comply with the nepotism policy.

In January of 1993, the Wrights brought suit challenging the constitutionality of the nepotism policy. The Complaint challenged the policy on equal protection grounds. A violation of First Amendment was never pleaded in the Complaint nor argued at any time during the pendency of the action in the District Court. In addition, Petitioners never moved to amend their Complaint during the lengthy period the action was pending in Federal District Court to add a claim of a violation of the First Amendment.

During the pendency of this lawsuit, the parties agreed not to transfer John or Martha Wright, but rather to arrange their schedules so that they would never be working at the same place at the same time. However, also during the pendency of this action in the District Court, MetroHealth officially informed the Petitioners (through counsel) that it remained MetroHealth's

intention to allow Martha to transfer to an entirely equivalent nursing position of her choosing at MetroHealth Medical Center to avoid problems under the nepotism policy.[1]

On April 24, 1994, the District Court granted summary judgment in MetroHealth and PHI's favor. Petitioners timely appealed from the District Court's ruling and further obtained a stay pending appeal. Respondents honored the stay and did not transfer Martha Wright. However, prior to the Sixth Circuit's July 13, 1995 affirmance of summary judgment, Respondent PHI terminated John Wright's employment for reasons entirely unrelated to the nepotism policy or any litigation challenging that policy. John Wright was terminated from employment by his employer, PHI, on April 6, 1995, for failing to respond to a "go-page" in order to attend to a critically injured patient.

Shortly after his termination, Wright brought suit against the instant Respondents, alleging various state law causes of action, including defamation, tortious interference with business relationship and violation of state public policy. In their Complaint, Respondents specifically state that they are "not challenging the nepotism policy . . . these were the basis of a prior suit". (Verified Complaint, Cuyahoga County Common Pleas Case No. 292123, Para. 15, n. 2). Respondents have answered this Complaint and vigorously deny its assertions. The parties are in the midst of discovery. Nowhere in that pending state court lawsuit do Petitioners suggest that Wright was fired on account of the nepotism policy.

On November 14, 1995, Petitioners filed another Complaint, in District Court, naming the same parties as

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1. Ms. Wright, pursuant to the Ohio Revised Code, is an unclassified civil servant employed at the will of the hospital. (*See* Ohio Revised Code §§ 339.06 and 124.11).

defendants. In this Complaint, Petitioners allege that Mr. Wright's termination was an attempt to "covertly implement the nepotism policy despite the stay [entered by the Sixth Circuit]". (Complaint in U.S. District Court Case No. 95CV2414 at ¶ 18). Attached to the Complaint was a "Suggestion of Dismissal" stating that the sufficiency of the Complaint in that action was controlled by the Sixth Circuit decision in *Wright v. MetroHealth*, 58 F.3d 1130 (6th Cir. 1995). The District Court entered the Order of Dismissal before Respondents had the opportunity to file an answer. The appeal from this entry of dismissal is now pending before the Sixth Circuit Court of Appeals.

It is based upon this second federal Complaint, dismissed upon plaintiffs' suggestion, that Petitioners represent to the Supreme Court of the United States that John Wright was fired under a nepotism policy. There is absolutely no other factual or record basis to support this demonstrably false assertion.

SUMMARY OF THE ARGUMENT

Certiorari is not warranted in this matter. The Sixth Circuit's decision is in harmony with this Court's decisions in *Zablocki v. Redhail*, 434 U.S. 374 (1978) and *Califano v. Jobst*, 434 U.S. 47 (1977). Furthermore, *every* federal court to rule on the constitutionality of nepotism policies has determined that, unlike the direct impediment to marriage involved in *Zablocki*, *supra*, reasonably drawn anti-nepotism policies place no direct legal obstacle in the path of persons desiring to get married and are therefore lawful under the analysis of *Jobst*.

Petitioners' attempts to mischaracterize the holdings of other federal decisions aside, the Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits have all, applying the rational basis test, affirmed the validity of nepotism policies against equal protection challenges. In addition, each Circuit, and indeed each

federal court to address the issue, has adopted the reasoning of this Court set forth in the *Zablocki* and *Jobst* decisions. There is no conflict. There is no confusion. Accordingly, the petition should be denied.

REASONS FOR DENYING THE WRIT

I.

THE SIXTH CIRCUIT OPINION IS ENTIRELY CONSISTENT WITH PRIOR OPINIONS OF THIS COURT.

The relevant provisions of the nepotism policy at issue are quoted in the Court of Appeal's opinion at pages 13a - 14a. The policy provides that:

> In order to prevent conflicts which may arise in situations where members of the same immediate family are employed by the Hospital, the Hospital will not allow an individual to be employed, transferred or promoted, where as a result any of the following would exist:
>
> 3. Members of the same immediate family being in positions which are of such close proximity that they would necessarily interact with each other in the performance of their duties. . . .

* * *

> C. If, as a result of a marriage between two employees, a violation of the nepotism guidelines arises, the affected employees will be given the option of electing which spouse will be moved to another position in the Hospital. . . .

It is uncontroverted that at all relevant times, Petitioner Martha Wright was given the option of transferring to any other equivalent position in the Hospital.

Citing this Court's opinions in *Zablocki v. Redhail*, 434 U.S. 374 (1978) and *Califano v. Jobst*, 434 U.S. 47 (1977), the appellate court properly determined that this policy does not violate the fundamental right to marry and is thus not subject to a strict scrutiny review. The Sixth Circuit properly noted that "not every state action which relates in any way to the incidents or the prerequisites for marriage must be subject to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may be imposed." 58 F.3d at 1134-35, citing *Zablocki*, *supra*, 434 U.S. at 386. The Sixth Circuit properly determined that, as the policy at issue is not a direct and substantial interference with the right to marry, the "rational basis" test is properly applied.

In *Califano v. Jobst*, *supra*, this Court upheld sections of the Social Security Act providing for termination of a dependent child's benefits upon marriage to an individual not entitled to benefits under the Act. As the opinion in *Califano* expressly noted, "the rule terminating benefits upon marriage was not an attempt to interfere with the individual's freedom to make a decision as important as marriage . . . there was no evidence that the law significantly discouraged, let alone made practically

impossible" any marriages. *Zablocki v. Redhail*, 434 U.S. at 387, n. 12, *citing Califano v. Jobst*, 434 U.S. at 47-48.

In sharp contrast, the governmental action at issue in *Zablocki v. Redhail* was a Wisconsin statute which provided that members of a certain class of Wisconsin residents could not marry within the state or elsewhere without first obtaining a court order granting permission. 434 U.S. at 375. Thus, this Court found that the plaintiff class in *Zablocki*, individuals with support obligations for non-custodial children, were subjected to a statute which "significantly interfere[d] with the exercise of [the right to marry]" and thus a heightened scrutiny was appropriate. 434 U.S. at 383. This Court explained that:

> [B]y reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way the incidence of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed, *See, Califano v. Jobst, ante*, p. 47, n. 12, *infra*, ... The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry.
>
> Under the challenged statute, no Wisconsin resident in the affected class may marry in Wisconsin or elsewhere without a court order and marriages contracted in violation of the statute are both void and punishable as

> criminal offenses. . . . These persons are absolutely prevented from getting married.

434 U.S. at 386-87.

Justices Berger, Stewart, Powell, and Stevens each wrote concurring opinions in *Zablocki*, and each Justice was careful to note the limited scope of the holding invalidating the Wisconsin statute. For example, Chief Justice Berger, concurring, stated that the majority holding in *Zablocki* is not:

> in any significant way inconsistent with the Court's unanimous holding in *Califano v. Jobst* . . . Unlike the intentional and substantial interference with the right to marry effected by the Wisconsin statute at issue here, the Social Security Act provisions challenged in *Jobst* did not constitute an attempt to interfere with the individual's freedom to make a decision as important as marriage . . . and, at most, had an indirect impact on that decision.

434 U.S. at 391.

Likewise, Justice Stewart, pointed out that "a state may not only significantly interfere with decisions to enter into the marital relationship, but may in many circumstances absolutely prohibit it". 434 U.S. at 392. Justice Stewart cited, as examples, rules against minors marrying, restrictions upon health screening prior to marriage, etc. *Id.*

Justice Powell, in his concurrence, stated that "the majority's rationale sweeps too broadly in an area which traditionally has been subject to pervasive state regulations." 434 U.S. at 396. Additionally Justice Stevens concurring, reiterated that a state may

> have valid reasons for treating married and unmarried persons differently. Classifications based on marital status have been an accepted characteristic of tax legislations, selective service rules and social security regulations. As cases like *Jobst* demonstrate, such laws may significantly interfere with decisions to enter into the marital relationship ... that kind of interference, however, is not a sufficient reason for invalidating every law reflecting a legislative judgment that there are relevant differences between married persons as a class and unmarried persons as a class.
>
> A classification based on marital status is fundamentally different from a classification which determines who may lawfully enter into the marriage relationship.

434 U.S. at 403-04.[2]

Subsequent decisions of this Court further confirm the lawfulness of governmental distinctions based upon marriage which do not directly and substantially interfere with the marital relationship. For example, in *Bowen v. Gilliard*, 483 U.S. 587 (1987), this Court considered a challenge to an amendment authorizing federal aid to families with dependent children (AFDC) that required that a family's eligibility for benefits take into account the income of all parents, brothers and sisters living in the same home. The question for review in *Bowen* was whether that requirement violated the Equal Protection Clause when applied to a family wishing to receive benefits to include within

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2. Justice Renquist dissented entirely from the majority opinion, stating that he would have affirmed the validity of the Wisconsin statute.

its unit a child for whom support payments were being made by a non-custodial parent. 483 U.S. at 589-90.

Justice Stevens, writing for the Court, rejected the claim that "some form of heightened scrutiny is appropriate because the amendment interferes with the family's fundamental right to live in the type of family unit it chooses". 483 U.S. at 601. This Court determined that "close relatives are not a suspect or quasi suspect class. As a historical matter they have not been subjected to discrimination; they do not exhibit obvious, immutable or distinguishing characteristics that define them as a discrete group, and they are not a minority or politically powerless". 483 U.S. at 602. This Court further stated that the statutory classification at issue in *Bowen* did not "directly and substantially interfere with family living arrangements and thereby burden a fundamental right". 483 U.S. at 603, citing *Zablocki, supra*, 434 at 386-87. *See also Lyng v. Castillo*, 477 U.S. 635 (1986) ("Close relatives are not a suspect or quasi suspect class" and statutory definition treating parents, children and siblings who live together as a single household for food stamp eligibility, but not more distant relatives does not "directly and substantially interfere with family living arrangements.") *See also Church of Lukumi v. Hialeah*, 508 U.S. __, 124 L. Ed. 2d 472, 520 (Justice Blackman, concurring in judgment, characterizing *Zablocki v. Redhail* as "invalidating certain restrictions on marriage as grossly under inclusive with respect to their purpose").

Thus, the clear authority of this Court supports the review of MetroHealth's nepotism policy under a rational basis test and, the Sixth Circuit correctly determined that a rational basis does exist to support this policy, as has every other Circuit to review the lawfulness of such policies.[3]

---

3. The Sixth Circuit found a rational basis supporting the nepotism policy to avoid potential conflicts that might arise when two closely related (Cont'd)

The cases of this Court relied upon by Petitioners — in marked contrast to the instant matter — all involve employees or citizens penalized for exercising First Amendment right. *See*, *Adler v. Board of Education*, 342 U.S. 485 (1952) (individual belonging to certain unpopular organizations disqualified from employment); *Elrod v. Burns*, 427 U.S. 347 (1976) (political patronage dismissals violated the First Amendment); *Keynishian v. Board of Regents*, 385 U.S. 589 (1967) (statutes authorizing removal of college faculty members for insidious utterances are unconstitutionally vague); *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977) (case discussing non-renewal of untenured teacher contract for alleged protected First Amendment activity); *Perry v. Sindermann*, 408 U.S. 593 (1972) (non-renewal of teacher contract for public criticism of college violated the First Amendment); *Pickering v. Board of Education*, 391 U.S. 563 (1968) (dismissal for letter to the editor critical of school violated the First Amendment); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) (political affiliation requirement for filling any vacancy held violative of First Amendment); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (denial of notary commission absent declaration of belief in God violative of First Amendment). Simply stated, these cases are irrelevant to any issue raised or that could potentially be raised before this Court on appeal.

(Cont'd)

persons allow their personal lives to impinge on their professional lives and to prevent morale among other workers from deteriorating due to the unique relationship between the married co-workers. 58 F.3d at 1136. The Seventh Circuit, in *Yuhas v. Libbey-Owens Ford Co.*, 562 F.2d 496 (7th Cir. 1977) found additional justifications for such policies, including the fact that a marital relationship "often generates intense emotions which would interfere with the worker's job performance . . . [and], if an employee who works with his or her spouse became involved in a grievance with the employer or another worker, the two spouses may be expected to take the same side in the dispute. . . . These reasons are far from frivolous. They correspond to the reasons which have led a number of institutions to conclude that family members should not work in the same environment." 562 F.2d at 499.

II.

THE SIXTH CIRCUIT'S DECISION AND ANALYSIS IS CONSISTENT WITH THAT OF EVERY FEDERAL CIRCUIT TO HAVE ADDRESSED THE ISSUE.

Every Circuit to address the legality of anti-nepotism policies has applied a rational basis test and upheld the policy at issue. In addition, every federal appellate decision rendered after 1978 has utilized the *Zablocki/Jobst* analysis. *See Waters v. Gaston County*, 57 F.3d 422, 426 (4th Cir. 1995) (upholding nepotism policy under *Zablocki* analysis and holding that policy does not "interfere directly and substantially with the fundamental right to marriage"); *Parsons v. County of Del Norte*, 728 F.2d 1234 (9th Cir.), *cert. denied*, 469 U.S. 846 (1984) (upholding Sheriff Department no spouse within department rule under *Zablocki* analysis); *Parks v. City of Warner Robins*, 43 F.3d 609, 614 (11th Cir. 1995) (upholding city anti-nepotism policy under *Zablocki* as it did "not directly and substantially interfere with right to marry"); *Cutts v. Fowler*, 692 F.2d 138, 141 (D.C. Cir. 1982) (holding that the burden on the right to marry caused by anti-nepotism rule is "attenuated and indirect").

Petitioners are wrong in stating that the Eighth Circuit, in *Espinoza v. Toma*, 580 F.2d 346 (8th Cir. 1978) and the Tenth Circuit in *Morfin v. Albuquerque Public Schools*, 906 F.2d 1434 (10th Cir. 1990) use a heightened standard in addressing equal protection challenges to anti-nepotism rules. Although the Eighth Circuit in *Espinoza* discussed an intermediate scrutiny test in reviewing gender-based challenges under the Equal Protection Clause, in addressing the constitutionality of the no spouse employment policy at issue in that case, the court expressly adopted a *rational basis* test:

> We must, therefore, consider the purpose of

> [the public employer's] policy and whether the classification utilized to carry out the policy is reasonable, not arbitrary, and has a *rational* relationship to the policies sought to be advanced by its operation.

Id. at 348, *citing Keckeisen v. Independence School District*, 612, 509 F.2d 1062 (8th Cir.), *cert. denied*, 423 U.S. 833 (1975).[4]

Likewise, the Petitioners misstate the law in contending that the Tenth Circuit has adopted a reasonableness standard in assessing equal protection challenges to nepotism rules. In *Morfin v. Albuquerque Public Schools*, *supra*, no anti-nepotism policy was involved. Plaintiff brought a First Amendment freedom of association claim alleging that her contract was not renewed because of her association with her husband. 906 F.2d at 1436. *Morfin*, like the Sixth Circuit opinion in *Littlejohn v. Rose*, 768 F.2d 765 (6th Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986) are classic freedom of association cases involving punitive action against employees based upon bias and ill will directed toward their spouses. Neither of these cases involve nepotism policies in any way, shape or form. Neither of these cases implicate the analysis set forth by this Court in *Zablocki* and neither of these cases are relevant to the instant appeal.

The other cases alleged by Petitioners to evidence inconsistency in the proper analysis for reviewing nepotism policies are grossly misrepresented in Petitioners' Brief. *Zavala v. City and County of Denver*, 759 P.2d 664 (Colo. 1988) simply did not involve review of a nepotism policy. In *Sioux City Police Officers' Association v. City of Sioux City*, 495 N.W. 2d 687 (Iowa 1993), the state court *did* use a rational basis test to uphold a

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4. In *Keckeisen*, *supra*, the Eighth Circuit upheld a no spouse rule in the context of school administrators and teachers.

nepotism policy. Likewise, in *Winrick v. City of Warren*, 299 N.W. 2d 27, 99 Mich. App. 770 (1980), the state court upheld a nepotism policy which included a blanket prohibition of working in the same department.

Bretz v. City of Centerline, 276 N.W. 2d 617 (Mich. Ct. App. 1979) was a First Amendment overbreadth analysis, irrelevant to the instant appeal. *Cybyske v. Independent School District No. 196*, 347 N.W. 2d 256 (Minn.), *cert. denied*, 469 U.S. 933 (1984) was a First Amendment analysis which did *not* involve a nepotism policy. Finally, in *Hamilton v. Board of Trustees of Oconee County*, 319 S.E. 2d 717 (S.C. App. 1984), the state court *upheld* a nepotism policy on the basis of this Court's analysis in *Zablocki*.

Indeed, the only decision which struck down an anti-nepotism policy was a pre-*Zablocki* and *Jobst* opinion of the Nebraska Supreme Court, *Voichahoske v. City of Grand Island*, 231 N.W. 2d 124 (1975). A single decision of the Nebraska Supreme Court, standing alone, hardly provides the basis for the exercise of Supreme Court jurisdiction, especially given the unanimity among all courts in upholding policies such as the instant one and in the analysis employed to reach that end.

III.

THIS CASE CLEARLY DOES NOT PRESENT AN IMPORTANT CONSTITUTIONAL ISSUE WHICH SHOULD BE RESOLVED BY THIS COURT.

The only parties professing any confusion regarding the proper analysis of nepotism policies like the one herein at issue are the Petitioners. This Court in *Califano v. Jobst* and *Zablocki v. Redhail* clearly established the proper analysis for equal protection review of governmental distinctions based upon

marital status. The Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits, and indeed *every federal court* to review such policies have applied the *Zablocki* and *Jobst* analysis and have found that such policies are to be reviewed under the rational basis test. Clarification is simply not necessary or needed from this Court. In addition, this is a case uniquely unsuited for High Court review. Petitioners attempt to characterize this as an action where an employee was terminated under a nepotism policy. However, this is clearly not the case before this Court. Indeed, the federal appeal on the termination (such as it is) is still pending in the Sixth Circuit. A parallel state action, challenging Mr. Wright's employment termination, is currently pending. Under these facts, it would be uniquely inappropriate for this Court to assert jurisdiction, particularly where there is such unanimity as to the proper analysis and result of cases challenging nepotism policies.

CONCLUSION

The decision of the Sixth Circuit below involved well-settled principles of law that are not in conflict with, nor does it represent a departure from, the usual course of judicial proceedings. Accordingly, Respondents MetroHealth Medical Center, William Fallon, Betty Kovach and Charlene Mancuso, request that the Petition be denied.

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Supreme Court, U.S.
FILED
FEB 15 1996
CLERK

No. 95-848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARTHA SABOL WRIGHT AND JOHN C. WRIGHT, JR.,
Petitioners,

v.

METROHEALTH MEDICAL CENTER,
PETROLEUM HELICOPTERS, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

(1) The decision of the Sixth Circuit in the instant case conflicts with the recent December 20, 1995 decision of the Eleventh Circuit in *Shahar v. Bowers*, 70 F. 3d 1218 (11th Cir. 1995). The plaintiff in *Shahar* had been offered a job by the Georgia Department of Law, but the offer was withdrawn when the Department learned that Shahar intended to "engage in a marriage ceremony" with her long time companion. 70 F. 3d at 1219. The circumstances in *Shahar* were further removed than the instant case from the rights recognized in *Zablocki v. Redhail*, 434 U.S. 374 (1978), because Shahar and her companion were both women, and thus under Georgia law the ceremony in question did not constitute a civil marriage. 70 F. 2d at 1222.

The Eleventh Circuit, citing *Zablocki*, held nonetheless that the denial of employment in *Shahar* was subject to strict scrutiny:

> the court holds . . . that *strict scrutiny* must be utilized. . . . The court believes that the general standard of *strict scrutiny* is applicable to Shahar's intimate association claim and that the acts of the Attorney General must be deemed to infringe on Shahar's rights unless shown to be narrowly tailored to serve a compelling

> governmental interest. . . . Marriage in the conventional sense is an intimate association significant burdens on which are subject to *strict scrutiny*. *Zablocki v. Redhail*. . . .
>
> . . . Shahar's intimate association rights were violated . . . . The . . . claim . . . is [remanded] to the district court for it to determine under *strict scrutiny* whether this violation infringed Shahar's constitutional rights.

70 F. 3d at 1224-26(Emphasis added); see *id*. at 1227 (Morgan, J., concurring)("I concur . . . that Shahar's rights of intimate . . . association have been burdened and that *strict scrutiny* is the proper test to apply.")(Emphasis added).

The Eleventh Circuit has thus adopted the very strict scrutiny standard rejected by the Sixth Circuit in the instant case, and has extended to homosexual marriages in the Eleventh Circuit the very constitutional protection denied to traditional marriages in the Sixth Circuit.

(2) Respondent disputes our characterization of several of the appellate decisions which conflict with the decision of the Sixth Circuit in the instant case.

Respondent asserts that the Eighth Circuit in *Espinoza v. Toma*, 580 F. 2d 346 (8th Cir. 1978), "expressly adopted a *rational basis* test." (Br. Op. 12)(Emphasis in original). The text of that opinion, however, makes clear that the Eighth

Circuit requires an anti-nepotism rule to satisfy a "reasonable[ness]" standard as well as the less stringent "rational basis" requirement.[1] Respondent maintains that in *Sioux City Police Officers' Association v. City of Sioux City*, 495 N.W. 2d 687 (Iowa 1993), "the state court *did* use a rational basis test . . . . "(Br. Op. 13)(Emphasis in original). Respondent provides no explanation or reference for this assertion; the text of the opinion, set out in a note below, does not mention the rational basis test, but instead applies a form of intermediate scrutiny including a requirement of narrow tailoring.[2]

Respondent seeks to distinguish *Bretz v. City of Center*

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[1]580 F. 2d at 348-49: "'A classification "must be reasonable . . . and must rest upon some ground of difference having a fair and substantial relation to the subject of the legislation . . . " '. . . We must, therefore, consider the purpose of the . . . policy and whether the classification utilized to carry out the policy is *reasonable* . . . *and* has a rational relationship to the policy sought to be advanced by its operation. . . . We are satisfied that . . . the preclusion of spouses [in this case] is a *reasonable* classification which bears *a fair and substantial relationship to the objectives of the policy.*" (Emphasis added).

[2]495 N.W. 2d at 697: "[T]he instant anti-nepotism policy is like the policy upheld in *Winrick v. City of Warren* . . . . The court applied the 'middle-level scrutiny' of equal protection analysis, asking whether the anti-nepotism provision had a fair and substantial relationship to a laudable legislative purpose. . . . . The anti-nepotism policy in the case at bar forwards an *important* governmental objective . . . and . . . is *narrowly drawn*. . . . We find that the . . . policy is a legitimate regulation of the city employment environment and is *narrowly drawn* so as not to impermissibly invade the employee's freedom of association."

Line, 276 N.W.2d 617 (Ct. App. Mich. 1979), as "a First Amendment overbreadth analysis." (Br. Op. 14). In fact, however, the opinion in *Bretz* contains no mention of the First Amendment, instead citing *Reed v. Reed's* "fair and substantial relation" standard. 276 N.W. 2d at 618. Similarly, respondent asserts that the plaintiff in *Morfin v. Albuquerque Public Schools*, 906 F. 2d 1434 (10th Cir. 1990), prevailed on a "First Amendment freedom of association claim." (Br. Op. 13). In fact, however, the Tenth Circuit actually rejected Morfin's First Amendment claim[3], and upheld her complaint only because it also asserted that the school board had taken action which constituted "unreasonable governmental interference" with her "marital relationship." 906 F.2d at 1439 (*citing Zablocki v. Redhail.*)

Respondent notes that the defendants ultimately prevailed in *Winrick v. City of Warren*, 299 N.W.2d 27, 99 Mich. App. 770 (1980), and *Hamilton v. Board of Trustees of Oconee*

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[3]906 F. 2d at 1439-40: "Morfin . . . argues that she exercised a First Amendment right to associate with [her husband] in support of his First Amendment activities . . . . Morfin's claim fails . . . . Both defendants were entitled to summary judgment on plaintiffs' free speech claims . . . [Defendant] Davenport . . . was entitled to summary judgment on . . . Morfin's First Amendment association claim, but not on Morfin's marital association claim."

County, 319 S.E.2d 717 (S.C.App. 1984). (Br. Op. 14). But respondent does not deny that in both instances the state courts applied a form of heightened scrutiny flatly inconsistent with the decision of the Sixth Circuit in the instant case.

(3) With regard to petitioner John Wright's discharge claim, respondent objects somewhat paradoxically that "the parties have had no ability to develop any record on this issue." (Br. Op. i). But there is and could not be any "developed evidence" on this claim *because* respondents prevailed below on their contention that adverse employment actions based on marital status simply are not subject to any form of heightened scrutiny under the Constitution. We seek review of the decision of the Sixth Circuit precisely because it precludes petitioners from litigating in either federal court or state court their claim that petitioner John Wright was dismissed as a consequence of his marriage to petitioner Martha Sabol Wright.

Respondent contends that factual allegation underlying petitioner John Wright's discharge claim is a "demonstrably false assertion." (Br. Op. 4). Petitioners do not ask this Court, however, to address the factual issues raised by respondent's denial, but seek only a decision that their allegations state a claim on which relief can be granted, and that petitioners are

thus entitled an opportunity to prove at trial the allegations of this claim.

(4) On December 29, 1995, the Sixth Circuit issued the following directive in *Wright v. Petroleum Helicopters* (CA No. 95-4260), the appeal of the 1995 district court decision dismissing petitioner John Wright's discharge claim:

> It appearing that this appeal is controlled by the precedent in this Court's decision in *Wright, et al*, v. *MetroHealth, et al*, Ca No. 94-3548, and pursuant to Rule 18, Rules of the Sixth Circuit, this matter will be *held in abeyance* pending the decision of the United States Supreme Court in Plaintiff-Appellant's petition for certiorari in *Wright, supra*.[4]

The court of appeals understandably regards this most recent appeal as controlled by its earlier July 13, 1995; should this Court grant certiorari to review that July 1995 opinion, it would be appropriate also to grant certiorari before judgement in *Wright v. Petroleum Helicopters*, so that these inextricably interrelated claims governed by the same standard can be resolved in a single proceeding.

CONCLUSION

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[4]Letter to Counsel from Deborah H. Ginocchio, Sixth Circuit Conference Attorney, December 29, 1995. (Emphasis in original). Sixth Circuit Rule 18(d) authorizes the entry of such a "pre-argument conference order."

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit and to review before the judgment the appeal now pending in the Sixth Circuit *sub nom. Wright v. Petroleum Helicopters, Inc.*.

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